

STRIKING AN ACCORD

Fiddling the alternative in alternative dispute resolution systems
within the electronic communications sector

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To Max, best of friends
and dearly missed companion
To Benjamin and my family

1 The sound of discord

Particularly in the last thirty years, the rapid blooming of technology and communications opened new roads for commerce¹, as well as the exchange of ideas and culture. The internet, with its ubiquity and potential to serve as a vehicle to widespread information and commercial and entertainment offers, became a regular household- and work tool for consumers, businesses and governments alike².

Yet to speak merely of the internet in today's communications revolution would be insufficient. In today's fast developing and technologically complex communications market, new products and services³ are continuously introduced, often in converged or bundled packages; traditional players extend their activities into new sectors, while new players enter the market, and the provision of services across borders becomes common place. This, in turn, has a profound effect in consumers' communications needs and behaviours, diversifying and changing them, and often presenting new regulatory challenges.

In parallel, that same metamorphosis of information and communications technology (ICT) brought about a greater availability and transparency of information: the publication, dissemination and accessing of information by and to a "global forum of users", over "global networks"⁴. On the governmental side, consumer friendly policies played a noteworthy role in encouraging the use of new technologies and in promoting the development of e-commerce. Such policies imposed, in several jurisdictions, the disclosure of a minimum content of information in communications services provision contracts,

¹ The paradigmatic example is e-commerce, though business models keep evolving in face of new market structures and social behaviours. See Laudon *et. alias* (2008).

² Contrastingly, the digital divide persists: <http://www.itu.int/wsis/tunis/newsroom/stats/>.

³ Potentially, even previously unregulated services.

⁴ Wikipedia, social forums and blogs, content-sharing services (YouTube, Photobucket), etc.

reinforced consumer rights and privacy and data protection, and mandated the publishing of comparative data and statistics⁵.

Nonetheless, this increased interaction and trade also propitiated a boost in litigation⁶. This isn't to say that historically litigation regarding trading or communication services didn't already exist. However the growing complexity of technologies and services available, of their provision contracts, and the globalisation introduced by the internet, impelled the emergence of new problems and disputes, especially on a consumer society⁷ setting⁸.

This partly laid bare the inadequacy of a more process-oriented judiciary system⁹, with traditional (physical) evidence and adversary processes¹⁰, to deal speedy and efficiently with electronic communications services (hereafter, ECS) market disputes, where decisions often need to be timely, so as not to render their effects useless.

Naturally then, the interest in alternative dispute resolution (hereafter, ADR) methods is to be understood. These are, in essence, techniques used for the solving of conflicts outside of traditional courts. They tend to enjoy a less formal and rigid process, which renders them potentially faster, less expensive and more flexible in achieving a solution. Thus ADR is likelier to appeal to parties and involve them more actively in a search for consensus. Traditionally, ADR is divided into three main types of proceedings, according to the level

⁵ Within the European Union, e.g. Directive 97/7/EC on the protection of Consumers in Respect of Distance Contracts (the Distance Contracts Directive), Directive 93/13/EEC on Unfair Terms in Consumer Contracts Directive, Directive 2000/13/EC on Certain Legal Aspects of Information Society Services (the E-commerce Directive) and Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (Data Protection Directive).

⁶ Bonnet *et al* (2004), p.1.

⁷ A human society strongly influenced and orientated by consumerism. Dictionary of Sociology, Oxford University Press, Third Edition, 2005.

⁸ Turel and Yuan (2010), p.425. In Portugal, the civil procedural code underwent changes to allow for speedier and simpler proceedings for debt recovery, partly impelled by the need for mobile operators to bring collective action against thousands of payment failure cases.

See http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=574&tabela=leis (Decree-Law no. 269/98, 1 September).

⁹ There are exceptions, such as simplified proceedings, to deal with e.g. small claims. E.g., the European order for payment procedure enacted by Regulation (EC) no 1896/2006 of the European Parliament and of the Council of 12 December 2006.

¹⁰ Notwithstanding the benefits brought by the creation of special consumer tribunals, by legislative or jurisdictional reforms aiming at simplification and speeding of Court proceedings, or by a progressive computerisation of legal systems and Court services.

of volition retained by the parties throughout and the formality involved: negotiation, mediation and arbitration (the last one implying already an adjudicatory decision by a third party; it is, of the three, the closest to the formality of a traditional judiciary procedure). Nowadays, however, there can also be found hybrid models, enclosing characteristics of more than one of these models or even with innovative aspects¹¹.

Though ADR is not free of shortcomings¹², namely concerning the enforceability of its decisions and its susceptibility to dilatory and good faith abuse, it can play a pivotal role in protecting business and consumer interests, while unburdening the judiciary system. “Ultimately, the test of successful dispute resolution (...) is its impact on investment, growth, and development in the sector.” It needs “to be as speedy as the networks and technologies (it) serve(s)”¹³.

With this background in mind, the present paper focuses on the level and type of litigation found within the settings of a developed country’s ECS market and attempts to shed some light into its causes. Then, drawing lessons from the growing body of commentary regarding ADR and consumer protection in a Digital Age, it strives to put forward concrete orientations towards a model of ADR that fulfils the aims of faster but fair and more cost-effective access to justice. Thus framed, this paper will also evaluate the role regulators (or other entities) must or should play in such a model and use as reference a case study and examples of employed ADR mechanisms.

It is difficult to assess, at this stage of development of the ECS market’s dispute settlement mechanisms, whether it is legitimate to sketch a proposal of ADR to serve as future reference, and even more so when taking on board a perspective of eventual harmonisation. National markets’ characteristics, experiences and business cultures weigh heavily in the choices made both on a regulatory and industry level. Nonetheless, it may be possible, based on the documented experience of ADR in this market’s context, to discover assumptions and patterns that need revising or that present especially positive results.

¹¹ Amongst other included literature: ITU (2004), p.22.

¹² *Op.cit.*

¹³ *Ibidem*, p.v and x.

1.1 Object

Though other types of disputes are present in an ECS market¹⁴, this paper's perspective will be one of B2C (business-to-consumer): customer disputes. Here the task of identifying trends in dispute resolution, as well as patterns in customer behaviour and expectations (potentiating a conflict stage), may be facilitated by the supply information available, for example by the hand of communications regulators or international organisations, consolidating experiences. The model to be proposed must be capable of satisfying both businesses and consumers.

Importantly, as well, it'll be assumed the reader has a general understanding of the concept of ADR and of its typical forms. Therefore, this paper will only undergo the study of ADR models insofar as they prove helpful composing a functional ADR structure. Some comparative analysis will be carried out, especially among employed ADR systems, but it will not be a main feature. This applies equally to electronic ADR (e-ADR) or online dispute resolution (ODR) methods.

Limiting this paper to the ECS market, in turn, imposes choices on its legal scope and which services to contemplate. On the first note, the perspective will be markedly European, taking the European Union (hereafter EU) internal market and law as key points of reference, while the case study focuses on the Portuguese experience. On the second point, it will not cover services that are not in itself communications services but merely depend on these as a vehicle for their providing or transmission. A different approach would require consideration to be given to all sorts of activities and markets, subject to different legal frameworks and different supervision and sanctioning authorities¹⁵.

¹⁴ *Ibidem*, p. vii.

¹⁵ This paper would forcibly cover varied content providing, even by non-operators; the commercial, advertising or entertainment activities offered through ICT infrastructures or services; the publication and/or distribution of intellectual property goods, and even privacy and personal data related issues, amongst others.

Similarly intermediary liability will not be comprehended. In EU Law, intermediary liability found what seems a balanced solution¹⁶, likely accounting for the residual nature of conflicts between Communications Services Providers (hereafter, CSP) and consumers on the subject.

Conversely, the general panoply of services commonly offered by CSP is included, insofar as they are accessory to the provision of communication services or are an integrant part of the contract. By “accessory” is meant the providing, directly or indirectly, by the operator of a product or service that enables the use of the communications service, but doesn’t constitute the main contracted service. For instance, customer service and the purchase of equipment or the equipment’s malfunctioning will be of interest, but the sale of magazines or tickets to events, even if organised or sponsored by a CSP, will not. Likewise an offer connected to the entering or changing of a contract will be of relevance. This is done for two reasons:

- 1) as the case study will illustrate, there is a need to not only make ADR mechanisms more agile, but also the distribution of positive competence to address complaints; and
- 2) because very specialised ADR systems require multiple resources to analyse and break down complaints according to jurisdiction, possibly preventing an integrated treatment of its issues and leading to case rework; they may cause conflicts of negative competence, and may alienate complainants. If for a vast number of complainants it feels instinctive to address one particular ADR system, it is worthwhile striving to comprehend why.

Finally, this paper shall exclude postal services. This is not to say the conclusions and proposed solution cannot equally apply with the necessary adaptations, but for simplification reasons they shall be left out.

¹⁶ Most relevantly, see E-Commerce Directive, Articles 12 to 15.

1.2 Method

In view of its practical orientation, this paper's methodology will be cross-disciplinary, though in the beginning it will tend towards a legal approach. The jurisprudential element will be almost absent, except where relevant to stress benchmarking practices or the complementary role of ADR towards the judicial system.

Commencing with an overview of the legal framework of EU communications market, it is submitted that current B2C complaint management and settlement have made little progress in shifting from traditional legal responses. While consumer rights are strengthened and ADR regulation increased¹⁷, a concerted reorganisation and redistribution of responsibilities which effectively improves access to justice has failed to come about. Thus, after analysing current shortcomings (Section 2), this paper discusses the need to focus on consumers first, in order to understand and respond to their concerns and expectations. Then, it looks at good governance principles and the engagement of technology, allied with a concerted participation by market stakeholders, to motion a system that is holistic in its approach to justice (Sections 3 and 5). This ADR system proposes to overcome present inefficiencies through structural and procedural choices regarding its configuration.

Aiming at justifying the suggested model, Section 5 also comprises a comparative analysis of ADR systems or complaint schemes already employed, most noticeably those by the English and German National Regulatory Authorities (hereafter, NRA): the Office of Communications (Ofcom) and the Regulierungsbehörde für Telekommunikation und Post (RegTP) (of the Bundesnetzagentur/Federal Network Agency), respectively.

The Portuguese case study illustrates many of the points discussed and allows for further conclusions (Section 4). Finally, and to ensure the system's sustainability, a broader plan is

¹⁷ From a legal standpoint, besides legislation mentioned throughout, see e.g. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on Certain Aspects of Mediation in Civil and Commercial Matters. On the academic side, both Cortés (both, 2010) and Schiavetta (2008) recently defended dissertations anchored on regulatory development of ADR.

suggested, focusing on policy certainty, transparency and education as contributors to dispute prevention (Section 6).

1.3 Terminology

Some concepts were so far used interchangeably, with more or less terminological precision. “ADR system”, “mechanism”, “procedure” and “scheme” have referred to the same reality, despite a legal mechanism being a part of the system or scheme it is inserted in. These concepts will continue to be used as synonyms, as no (sensible) misleading arises. Hence, ADR will mean any structures in place to deal with complaints or requests presented by consumers or electronic communications services end-users, with the intention of seeking redress, changing a state of affairs or constituting, demanding or stopping the exercise of a right, outside and as an alternative to Court litigation (without prejudice of review or appeal). In this broad sense, the term includes internal dispute resolution (IDR), though IDR will be used when referring to internal mechanisms alone.

Similarly, “consumer” and “end-user” may be used alternatively, despite their different scopes. The notion of “consumer” enjoys a reasonably harmonised definition throughout Community legislation as “any natural person who...” uses or requests a publicly available electronic communications service or acts for purposes “which are outside his or her trade, business or profession”¹⁸. “End-user”, on the other hand, corresponds to the meaning given in Framework Directive, Article 2(n)¹⁹: “a user not providing public communications networks or publicly available electronic communications services”.

The definition of “end-user” encompasses a reality that escapes the quoted notion of “consumer”: *legal* persons that use or request a publicly available electronic communications service while acting outside their scope of activity. Being hard to justify upfront a numeric limit to distinguish between which legal persons to incorporate in a B2C

¹⁸ Framework Directive, Article 2(i) (Directive 2002/21/EC); E-Commerce Directive, Article 2(e); Distance Contracts Directive, Article 2(2), or Unfair Terms in Consumer Contracts Directive, Article 2(b), e.g.

¹⁹ *Ibidem*.

context, as opposed to a business-to-business (B2B) one²⁰, a juridical criterion is proposed: for this paper's purposes, end-user comprises natural and legal persons whose ECS contracts correspond to standard contracts, i.e., where no bargain power existed to negotiate those clauses, in entering into contract. It is a position in harmony with the rationale behind, namely, Universal Service Directive's Article 34(1)²¹, final statement.

The term "subscriber", as drawn in Framework Directive, Article 2(k), may be used to stress the contractual relationship. The term "user", if resorted to, will simply refer to the one of end-user, with no correspondence to its legal definition.

"Electronic communications services" will correspond to that stated under Framework Directive, Article 2(c), and "communications service provider" will stand for any natural or legal person providing ECS in the referred sense. National Regulatory Authority will have the meaning attributed by Article 2(g), also of the Framework Directive.

To conclude, a definition of "complaint" is essential and the one proposed by the International Standard Organisation in ISO 10002:2004 (Quality Management – Customer Satisfaction – Guidelines for Complaints Handling in Organisations) will serve as reference: "Complaint means an expression of dissatisfaction made to" a CSP related to its "products or services, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected"²² (by a complainant/claimant/end-user/consumer). The Australian Standard AS ISO 10002 – 2006 "Customer Satisfaction – Guidelines for complaints handling in organisations", issued by Standards Australia in April 2006, is also taken into account. It should merely be added that faults/omissions by undertakings are comprised, as they too originate dissatisfaction. Conflicts will, therefore, be understood as *prima facie* incompatibilities between the interests or perceptions of

²⁰ In the UK, Ofcom comprises "companies with 10 or fewer employees" in its consumer protection policies: namely, Ofcom (2009), Point 4.6. In Portugal, only natural persons are considered end-users for purposes of consumer disputes handled by the Portuguese communications NRA.

²¹ Directive 2002/22/EC.

²² http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=35539

opposing parties, requiring a process of management of that incompatibility in order to find a compromise or a solution favourable to one or both parties.

2 The orchestra: the interplaying of EU instruments and national law regarding B2C disputes in the electronic communications sector

From tariffs transparency to clearer contractual terms, the promotion of quality standards, the decreasing of barriers for disabled users and economically disadvantaged consumers, or the stimulation of IDR adoption by CSP, to name a few, the measures and initiatives to kindle consumer confidence while ensuring them maximum protection and benefits on using ECS, have been hot topics in policy-making agendas, both on the international and national levels²³.

Nonetheless the type and degree of consumer protection within a communications market vary on a national stage. The framework found in developed countries typically encompasses three major categories – consumer law, information and communications technology law and competition law – and additionally comprises co- and self-regulation initiatives. However in developing countries some of these may be lacking²⁴. This may include the absence, for example, of specific telecommunications legislation and of an independent regulatory authority to oversee the sector, represent consumer interests or address their concerns and complaints.

²³ E.g., by the ITU and The World Bank, amongst other initiatives, the “*Global Seminar on Quality of Service and Consumer Protection*”, held in 2006; by the PT IRG End-Users, the 1st meeting on “Transparency of Retail Tariffs Project”, in Norway, 2008; the recent public consultation by the European Union’s Consumers Affairs on a draft harmonised methodology for classifying and reporting consumer complaints and enquiries (http://ec.europa.eu/consumers/strategy/complaints_en.htm); by the English NRA, Ofcom, the Consultation on Protecting Consumers on the Mis-selling of Mobile Telecommunications Services (<http://www.ofcom.org.uk/consult/condocs/mobmisselling/mobmisselling.pdf>).

²⁴ Southwood (2006), p.9 ss.

Yet even when contemplating the “paradigm” of a communications market in a developed country, the adequacy and effectiveness of the body of rules in place must be questioned in face of changing consumer patterns, to ascertain consumer safeguard is sustained. One of the elements that can serve as a barometer is the type and level of litigation registered within a given communications market and the efficacy felt regarding the settlement of disputes.

Indeed, judicial procedures may prove too lengthy, expensive and lack the technical expertise²⁵ to adequately deal with disputes arising from a swift changing market as that of communications. Even when considering simple contractual conflicts related to the provision of services, it is unlikely these can be dealt with in a reasonable timeframe. In addition, cost-benefit considerations may deter consumers from seeking justice in Court²⁶. It becomes necessary to look for alternative solutions²⁷.

On the international level, the intertwining of the ‘official and unofficial sectors’ regarding ICT dispute resolution is considerably wide-ranging²⁸, especially in relation to consumer disputes²⁹. In the EU, Member-States are to ensure their legislation “does not hamper the use of out-of-court schemes”³⁰, “including appropriate electronic means”³¹. Such schemes must be transparent, non-discriminatory, simple and inexpensive, and should enable “disputes to be settled fairly and promptly”³². Furthermore they may adopt reimbursement and/or compensation systems³³. This adoption may be done by associating the reimbursement/compensation with consumer rights or by imposing the implementation of

²⁵ Especially on matters involving great technical detail and technological proficiency. Cortés, “Developing...” (2010), p.3.

²⁶ *Ibidem*, p.2-3.

²⁷ Also OECD (2010), p.14. “The issue is not whether a contract can be enforced but rather the cost of the various enforcement mechanisms and their efficacy in improving confidence between contracting parties. To be effective, the costs of enforcement must not outweigh the gains achieved from increased contractual commitment.”

²⁸ ITU (2004), p.63ss.

²⁹ *Ibidem*.

³⁰ *Ibidem*, Article 34(3); E-Commerce Directive, Article 17(1).

³¹ E-Commerce Directive, *ibidem*.

³² Universal Service Directive, Article 34(1). Or, in the wording of E-Commerce Directive, recital 51, their “functioning [should be] genuinely and effectively possible in law and in practice, even across borders”.

³³ Universal Service Directive, Article 34(1).

such mechanisms within B2C ADR procedures. Member-States are therefore encouraged to foster impartial out-of-court initiatives and are given significant discretion in defining the roles and interrelation between judicial and other governmental authorities and independent and/or private ADR systems.

For their part, under EU law, communications NRAs presently pursue their consumer protection duties through three main gateways, set *ex ante* to the emergence of conflicts³⁴:

A) They promote the availability and transparency of information and publish statistical and comparative data to raise consumer awareness.

B) They incentivise the adoption or adherence to ADR systems by CSP and consumers, as well as soft law initiatives (e.g., codes of conduct).

C) They complement legislation by issuing guidelines, recommendations and decisions; resort to benchmarking; hold open public consultations and keep statistics, for policy-making guidance purposes.

Furthermore NRAs oversee the market and compliance with the sector's rules by CSP and other relevant stakeholders. To that end, they can namely conduct inquiries and begin administrative procedures. These may culminate in the application of sanctions, in case of violation of statutory or regulatory obligations by providers. Additionally, they can, within specific cases, mediate conflicts between undertakings or issue binding decisions at either of the parties' request (for example, between operators regarding network access³⁵).

In practice, this means NRAs fulfil a double role. A purely vertical role, regarding the exercise of their general functions (regulation and oversight). And one with horizontal implications, stemming from that first *vinculum*: mediation of conflicts between undertakings. This sets end-users aside. Only through NRAs' decisions and regulations

³⁴ Framework Directive, recital 13 and Article 8. Most specification of NRAs' duties and obligations results from individual Member-State regulation, in fulfillment of transposed norms (*Ibidem*, Article 3(4)).

³⁵ Framework Directive, Article 20, and Access Directive, Article 5(4). Also, Framework Directive, Article 21, on cross-border disputes.

resulting in obligations for CSP, may there be added safeguards or rights for consumers³⁶. Yet these are enforceable on a contractual level only, being therefore deprived of the possibility of enactment through official mechanisms at the disposal of NRAs. What's more, because contractual breach falls under private law, the consumer's problem will not be dealt with together with public issues raised in a complaint received by NRAs. There are no (immediate) rewards or remedies for end-users within such proceedings.

This is not to say that particular NRAs cannot have assumed, in their statutes or in fulfilment of statutory duties, a role closer to that of a mediator or arbitrator in regards to (some) consumer conflicts³⁷. Yet such a duty does not originate directly from EU legislation³⁸.

NRAs' powers are bounded by the conferred powers principle and speciality principle³⁹. To extract a duty for NRAs to assume the role of "consumer dispute adjudicator or mediator" from general (and programmatic⁴⁰) rules on consumer protection, in respect to the contractual relationship between undertakings and end-users, would be an *ultra vires* interpretation.

In a period where consumer protection and fundamental rights have such a growing importance in EU legislation⁴¹, it may be asked whether this is desirable or what changes

³⁶ E.g., Ofcom (2008) "Review on Additional Charges...", or ICP-ANACOM's Decision on not billing consumers on voicemail calls up to 5 seconds (Deliberation of 16 May 2002).

³⁷ See Section 5.4.

³⁸ When compared with the redaction of Framework Directive, Article 8, Articles 20 and 21 of the same Directive provide a legislative argument supporting the delimitation of NRAs' powers to disputes between undertakings. While in Articles 20 and 21 the Community legislator opted to expressly regulate the need and general terms of the procedures to adopt on a national level regarding disputes between undertakings, on Article 8(b) there is merely a general and programmatic obligation for NRAs to ensure the availability of ADR procedures, carried out by bodies independent of the parties involved, and inserted under the epigraph "Policy objectives and regulatory principles". Also corroborating this reasoning, in Universal Service Directive, Article 34, the literal element points to an obligation of Member-States (and not necessarily of NRAs) to ensure the existence and creation of such procedures.

³⁹ Embodied in EU Treaty, Article 5(1) and (2) and Article 13(2).

⁴⁰ Rules that provide guidelines for the legislator (*lato sensus*) on what values and goals should be promoted or protected.

⁴¹ Namely Treaty on the Functioning of the EU, Articles 12 and 169; Framework Directive, Article 8(4)(b), or Charter of Fundamental Rights of the European Union, Article 38.

are compatible with those principles, in order to reinforce consumer protection and effective access to justice.

2.1 Alternative roads?

A more authoritative approach could be taken, for example, with the EU assuming a perspective of strong regulation and leaving the implementation and oversight of regulations up to the administrative mechanisms of Member-States, namely the NRAs. Oppositely, the system could rely on self-regulation, best practices and codes of conduct, trusting competition to ensure fairness, the optimisation of offers and prices (and thus of choice and benefits for consumers) and the setting up of functional and speedy ADR, motivated by the dictum that a satisfied client does not change operator(s).

2.1.1 The hard law approach

In the first case, there is a notorious disregard for the principles of conferred powers and subsidiarity⁴². The EU would have to reach the conclusion that the demands of building the internal market required a stronger intervention and that Member-States were not capable of reaching the desired results, on their own or by way of a coordinated initiative (co-regulation) with the industry players or the EU itself. It would represent a clear departure from current practices of deregulation, simplification and differentiation in policy and rule-making. It would be disproportional to the objectives pursued⁴³.

From an industry perspective, such an over-prescriptive system would likely deter investment and development, raise administrative costs for CSPs, and consequently for consumers, and possibly levy disproportionate burdens on the companies. Moreover, strong statutory interventions may prove insufficiently flexible, react too slowly to the market's needs and disregard or lack industry expertise.

⁴² EU Treaty, Article 5.

⁴³ *Ibidem*, Article 5 (1) and (4).

2.1.2 The soft law approach

In the second case, the risk would be in sacrificing consumer interests and protection for the sake of incentivising the market's growth and competition, without ensuring that free and fair competition had a healthy and solid environment to be sustained by. In fact, the market within the Community space as it is today seems to corroborate that an attempt to leave the handling of B2C disputes to the market's own devices would not be entirely successful.

Today's Community policy-making already puts a growing emphasis on self-regulation and bottom-up decisions, leaving a supple range of solutions at the disposal of Member-States. It gives voice to a policy of unification and cohesion through a differentiated approach, which may propitiate a stable and continuous development of the internal market and economy, as well as social wellbeing. Because Member-States have a better perception of their home markets and their specificities, they're believed to be in a better position to address market failures. In turn, Member-States attempt to engage the market's players⁴⁴ in the drawing of regulatory solutions, as consensus and the recognition of common interests have the potential to bring forth stable, proportionate and effective measures.

If at times industry-led approaches have shown to be a reaction to a threat of statutory intervention⁴⁵, industry incentives still won't always match consumers' interests. The industry or individual companies may be resilient to act in a way that is adequate to reach public objectives, requiring at least some degree of statutory intervention to ensure those objectives are met. This in itself justifies the need for top-down decisions.

Moreover there are needs the market only with difficulty will address, such as those of economically disadvantaged families, special needs groups⁴⁶ or simply the common user's lack of bargaining power on entering into contract. Similarly, despite of all the information available, consumers won't always make the optimal choice. Not only is the consumer's

⁴⁴ E.g., CSPs, consumer organisations, trade associations, the public, academics, amongst others.

⁴⁵ Ofcom, "Identifying..." (2008), paragr. 2.24.

⁴⁶ Disabled users, elderly citizens, or minors, for instance.

ability to understand all aspects of the functioning of the market and available services a fallacy, as it is to believe in the consumer's willingness to choose the option which will grant him or her⁴⁷ the most benefits every time. Marketing, peer pressure and general opinion are just a few of the factors that jumble the decision-making process.

Thus, an evaluation of the necessary balance between different regulatory approaches is essential in each case. Regulatory solutions evolve over time and, at this point of development of the market, State regulation is still required, but should be forward-looking. The road ahead is one of increased deregulation, at least in what concerns general policies. The tendency seems to be, and desirably so, for stronger intervention only on specific points of distortion of competition.

2.1.3 The desirable starting point

Discarded the options of differently orientated systems, the intertwining of mechanisms and legislation in place in the EU market is one with the potential to best meet the goal of adequately addressing B2C disputes. It allows the market to function without undue interference or burdening and displays the ability to align the best interests of all parties: state, industry and citizens. Nonetheless the timeliness, efficiency and efficacy of currently available consumer dispute settlement mechanisms are susceptible of criticism and conflict levels cannot be said to be decreasing⁴⁸.

⁴⁷ For simplification purposes, consumers/complainants/users will be referred to in the male gender.

⁴⁸ See, ahead, the Portuguese and German examples.

3 Sound Check: reaching consumers while attending to the market's needs.

3.1 Customer satisfaction and quality management

Beforehand, it's essential to understand the correlation between customers' expectations and experience. In developed markets, most CSP offer customer service, as customer satisfaction is an important element to win over competition. Customer satisfaction is, however, closely connected to the way end-users experience and evaluate the performance of their CSP, both regarding the services or products provided and customer care. It's by and large a psychological process. For some consumers, satisfaction might express a positive reaction to a performance that fulfilled their expectations, while to others this may be met with indifference, because satisfaction is associated to a performance which substantially exceeds their expectations⁴⁹.

This psychological dimension is also embedded in the act of complaining⁵⁰. Complainants wish to be treated fairly and with respect; to be listened to and have their position acknowledged⁵¹ instead of feeling or being judged; be given an explanation and/or an apology; have action taken and be kept informed of its progression; and to be guaranteed the problem will not repeat itself. An end-user who experiences a mishandling of his complaint is likely to maintain a feeling of dissatisfaction towards the CSP, even if the

⁴⁹ "Intrinsic quality and perceived quality are two different things especially as consumers are becoming more demanding and informed about the choices available to them.", *in* Consumer Satisfaction Survey, conducted by the Malaysian Communications and Multimedia Commission, the Malaysian NRA: <http://www.skmm.gov.my/consumer/css.asp>.

⁵⁰ Andreasen (1988), and Chelminski (n.y).

⁵¹ There is evidence inclusively of a difficulty felt by some complainants to have their complaints recognised as such by their CSPs – e.g., Ofcom (2009), Points 4.21, 4.45-4.48, amongst others.

complaint is resolved in his favour (because he will have experienced emotional distress, loss of time and/or income, unnecessary expenditure, etc⁵²) and thus might not wish to keep his contractual bonds beyond strictly necessary⁵³.

This implies complaint-management systems play an important role in risk management, not just because complaints have an impact on CSP's public image and may compromise performance standards and quality assurance policies, but also because they are crucial in acquisition and retention of customers. Hence, those psychological needs must be met by an ADR system that proposes to offer quality and voice to the consumer.

3.2 Information

Increasing awareness of existing IDR and ADR systems, of their functioning and their accessibility is key to empowering consumers and give a practical effect to the right of complaint. This may be pursued at a moment prior to the manifestation of dissatisfaction, at the conflict stage or through a combination of both. Preference is given here to raising awareness at both phases. Doing so earlier strengthens consumer trust, as it gives the user a sense of ground for dialog and compromise should something go wrong, while at a conflict stage, it reminds consumers of the choices of action at their disposal and dispels distress associated with lack of bargaining power.

As specific awareness-raising measures and the minimum of information to be included are discussed ahead (Sections 3.3.1 and 5), a brief outline here suffices. ADR existence and means of access should be displayed with adequate prominence, clarity and synthesis in all main points of interaction between providers and consumers (a CSP's website, points of sale, customer service channels – e.g., emails, enquiry replies and voice message in helpline service – and marketing material), besides contracts. Further, similar information

⁵² Stress, anxiety, frustration... http://www.ofcom.org.uk/consult/condocs/alt_dis_res/futuresight/. Also, confirming these results, the later study conducted at OFCOM's request by Synnovate, in Ofcom, (2009), Points 4.21, 4.33-4.38 and Annex 8.

⁵³ **Erro! A origem da referência não foi encontrada.***em*, Point 4.15.

should be included in the NRA's website and in the replies to consumer enquiries or complaints it may receive.

Inadvertently, this may result in an escalation of complaints, including frivolous and vexatious complaints⁵⁴. Nonetheless, the benefits of increasing awareness and accessibility far exceed potential costs⁵⁵ brought by a complaint rising: enhanced consumer trust and empowerment, effective access to justice, industry constraint by competition and likely improvement or innovation in complaint-handling (namely, to avoid external ADR costs). It should be a target for the market to provide ever better service with growing quality and choice, including customer service, and this, in turn, can lead to decreased levels of dissatisfaction⁵⁶, or at least of complaint lodging.

Still, even where consumer satisfaction promotes competition, it is not clear end-users will always take consumer service quality standards into account when choosing their CSP. This is especially so if they have other benefits to gain⁵⁷ or consider it unlikely to need customer service and making a complaint in the future⁵⁸ (similarly to early termination penalties “surprises”: most consumers don't enter contracts considering they may terminate them before the expiry of the minimum contract period, often overlooking additional charges associated with early termination as a relevant choice factor between services and CSP). Indeed, consumers should have the freedom to opt for the CSP whose customer service best suits their needs. The relevant starting point is that they must be provided with clear and complete information on which to base their choice on.

Hence, regulatory intervention may be required concerning the publication and marketing of consumer service quality standards, performance standards (namely, service quality) and other quality assurance policies by CSP. Only aware of the benefits and consequences of

⁵⁴ See ahead, the case study.

⁵⁵ As a reference, see the estimation of cost rise associated to increase of ADR awareness conducted by Ofcom: “Statement...”, Point 5.29 Ofcom (2010)

⁵⁶ For examples of types of dissatisfaction associated with complaint-handling procedures, see Ofcom (2010) “Statement...”, Point 3.28, Figure 2.

⁵⁷ *Ibidem*, Point 4.14.

⁵⁸ *Ibidem*, Point 4.16.

the existence, or inexistence, of those contractual obligations, can end-users strive for compliance by their providers and seek redress. This is instrumental to ADR effectiveness itself. Similarly marketing materials and other sources of consumer information should be ensured to provide a high level of transparency and completeness, further contributing to proactive dispute prevention.

3.3 A proposal for a multi-layered complaint-handling scheme

The objectives of the scheme have been identified above: to provide fair, affordable and timely resolution of complaints presented by end-users to their CSPs, in an effective⁵⁹ and efficient manner. The procedure must be accessible (neither imposing nor constrained by obstacles which may hinder the exercise of the right to complain – see note 65); friendly (ease of use, comprehensible in its process, flexible, reliable and contemplative of multicultural diversity, e.g. language) and it must be conducted in accordance with the rule of law, be transparent and be impartial, including with regard to the outcome. Its solutions must be substantiated, predictable and should be susceptible of enforcement (a binding decision which can be enforced or subjected to judicial review)⁶⁰.

Thus orientated, the scheme incorporates the mechanisms already present in the market, along with their experience and expertise, and is responsive to the end-users' needs and feedback.

3.3.1 Common points: defining and implementing an ADR policy and mechanisms

Most – if not all – IDR/ADR share common features. When used effectively, complaint-management systems can assist in monitoring the implementation of regulatory obligations and help develop a more effective compliance culture. Equally important, they permit identifying systemic issues and improving business models and customer service itself, namely by pushing forward innovative business solutions.

⁵⁹ Including cost-effective.

⁶⁰ For a definition of these principles, see the Commission Recommendation of 4 April 2001, *infra*, and corresponding articles in Black's Law Dictionary, Bryan A. Garner (Ed.), Gale Cengage, 9th Edition (Hardcover).

Consequently, B2C complaint-management systems need a core set of principles, standards and objectives that express the entity's commitment towards their users/consumers, guide staff when addressing consumer concerns and inform the public of how complaints are handled. These guidelines should suit the "individual needs, structure and modes of service delivery"⁶¹ of the entity that conducts ADR. Nonetheless, there is a minimum normative core to be demanded in a democratic state of law (Section 4.3)⁶². Those principles and practices should be embodied in a complaint management policy and corresponding complaint-handling procedure(s). While the procedure(s) implement(s) the policy's purposes, it is up to the policy to set the direction, clarify meanings and facilitate consistency and fairness in decision-making.

Ensuing, to ensure maximum effectiveness of an ADR system, "the complaint-management policy must be consistent with [the entity's] strategic goals, operational plans, performance standards (...) and quality assurance and risk management policies"⁶³. Further on, it requires internal and external dissemination of the policy and complaint procedure(s). To this aim, operators and NRAs have a wide range of strategies at their disposal, namely: workshops and other educational initiatives, both for the staff handling the complaints and other workers connected to the entity's public image (e.g. public relations, marketing or service managers, as well as chief-executive officers); information sharing and networking (e.g., between companies and/or other consumer affairs professionals); awareness campaigns addressed at consumers; process reviews and improved reporting, or improved partnerships.

Concomitantly, market research, information networking, benchmarking (namely, for effectiveness and performance evaluation, budgeting and cost control), codes of conduct and best practices can be used to improve existing complaint-handling systems, raising standards and maximising end-users' experience. Especially for NRAs and CSP offering a

⁶¹ Queensland Ombudsman (2006), p.1.

⁶² For a more comprehensive listing: International Standard Organisation in ISO 10002:2004 (Quality Management – Customer Satisfaction – Guidelines for Complaints Handling in Organisations); Australian Standard AS ISO 10002 – 2006 "Customer Satisfaction – Guidelines for complaints handling in organisations".

⁶³ Queensland Ombudsman (2006), p.3.

myriad of complaint procedures, there's a need to make them complementary and guide end-users through the process. CSP and NRAs may opt to keep their complaint channels separated into different response units, but for end-users it is all part of one overall multi-channel experience. They choose how they approach CSP or the NRA, not the opposite. Therefore, it's relevant that end-users have an understanding of how their complaints will be processed and analysed. End-users must be informed clearly and transparently, in plain language, of:

- a) The scope of the policy and procedure(s) (to whom and what they apply):
 - the limits of NRAs' jurisdiction on national markets and over specific services may not be clear to consumers; similarly, CSP may offer different customer service and complaint systems to different types of clients or according to the package(s) or services contracted;
 - CSP may choose to handle complaints presented solely to and about their own services or choose to include (some or all types of) complaints presented to or concerning their agents and business partners. This extension has the advantage of heightening CSP's awareness of their partnerships' quality and business standards. It may be achieved by creating codes of conduct between the operators and their partners regarding quality standards on service and complaint-handling, as well as complaint-report mechanisms⁶⁴, and
 - clarification of legitimacy and admissibility criteria: individual complaints only (and by whom: natural persons, small business retail customers, etc), or acceptance of collective, representative and aggregated complaints, etc;

⁶⁴ Though the potential costs of forwarding all complaints or of an eventual interconnection of the companies' information systems may render these alternatives impracticable, a (finely tuned) reporting system between operators and their partners can nevertheless contribute to improve the partnership. It can function as a valuable risk management and marketing tool, while benefiting consumers. Such reporting should namely concern the number and type of complaints received, the average time for their resolution and an agreement on general complaint-handling minimum standards to be observed, in addition to the forwarding of complaints that specifically concern the CSP's services/products. Here, too, educational initiatives, such as workshops for the CSP's partners' staff dealing with customers and complaint-handling can not only endow workers with a vision of the values and goals of the CSP, but also help prevent an escalation of complaints into disputes, by transforming the bottom line (the partners and their staff) into an effective customer relation channel for the CSP itself.

- b) Core principles, specific goals and quality standards – including disclosure of any benchmarks of seriousness or formality required before the complaint procedure is activated (if any); criteria for assessing prioritisation of complaints (if any), and assertion of confidentiality and due respect on analysis;
- c) Costs for the end-user, if any;
- d) How/when information about progression of complaints is given/accessible to the claimant;
- e) Possible outcomes – namely, types of outcomes (advice, decision, forwarding to another entity, inquiry without decision relevant for the claimant...); binding or non-binding nature and enforceability of outcome; whether there is a redress mechanism in place or enforcement oversight by an authority, etc;
- f) Timeframes – including average time of response or decision;
- g) Requisites for review of decisions, when existent, and by whom, including information about the expertise and experience of the reviewing body/panel/officer, where appropriate, and about other ADR systems, alongside admissibility of appeal to Courts, and
- h) Welcoming of feedback – responsiveness to end-users surpasses offering flexible solutions, acknowledging their participation in the proceedings or allowing them to seek information on the progression of the complaint. It includes valuing their experience when going through the process and using their feedback to improve the system. Complaints cost money and customer feedback is vital for risk management⁶⁵.

Finally, and taking into account the multicultural landscape of the EU space, thought should be given to incorporating multi-language versions.

⁶⁵ Just as by highlighting systemic failures it permits their correction and potentially decreases future claims' costs (and loss of customers, for operators), feedback can assist in identifying aspects perceived as positive by complainants, allowing to reproduce such features *mutatis mutandi* in other points of the system.

4 Jazzing up consumer rights in Portugal: a case study.

In 2006, in Portugal, Decree-Law no. 156/2005, 15th September⁶⁶, extended to the communications market the obligation for establishments open to the public to make a complaint book available to their customers.

4.1 The complaint book

The complaint book consists of a paper-made instrument, in the shaping of a regular book, where consumers may register complaints against the CSP the book pertains to. Its pages are numbered and available in triplicate-form. The first copy is intended for the regulatory authority; the duplicate for the complainant, so as to provide him with a physically durable copy he can refer back to; and the triplicate, which must remain in the book, for purposes of inspection by the competent NRA.

The book is available to customers at the premises of every establishment open to the public gratuitously, freely (without requiring justification) and immediately on request. If the book is refused or inexistent, customers may solicit the presence of public authorities and file a complaint, which is sent to the NRA. Both its refusal and inexistence constitute statutory infractions. All complaints are sent to the competent authority, ICP-ANACOM, the communications NRA⁶⁷, within a maximum period of 5 days. The displaying of a

⁶⁶ Altered by Decree-Law 371/2007, 6 November, and Decree-Law 118/2009, 19 May. For a general understanding:

<http://www.anacom.pt/render.jsp?contentId=296309>

<http://www.anacom.pt/render.jsp?categoryId=246722>

http://ec.europa.eu/consumers/events/euro_cons_summit/docs/Ribeiro.pdf

For a Portuguese version of all Acts:

http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=737&tabela=leis

⁶⁷ Decree-Law 156/2005, Articles 1 to 6.

signpost, informing of the availability of the book in that establishment and the authority the complaints are sent to, is also compulsory.

CSP are required to contest complaints, within 10 days, when notified to do so by the NRA on specific cases. The regulator keeps statistical data on the type and nature of the complaints, which is periodically sent to the Direccção-Geral do Consumidor (Directorate-General for the Consumer, hereafter DGC)⁶⁸.

4.1.1 Rationale of Decree-Law no. 156/2005

The Act endeavours to empower consumers, by endowing them with the means to exercise their right of complain *in locus*, strengthening their rights of citizenship, information and access to justice: all complaints are to be duly analysed and answered.

Concomitantly, it sets in place a market monitoring system, with clear benefits for the State. By reporting occurrences via the complaint book, each complainant is in turn a controller of the market's activities, alerting authorities to (potential) violations of sector rules and contributing to the overseeing and sanctioning roles of those same authorities.

4.2 Requiem for the Complaint Book

The book may rightfully be praised by its accessibility and ease of use, which in turn contributed to a strong generalised awareness and adherence by the public. In very generic terms, the majority of complaints received may be divided into three groups:

- a) those concerning communication services *proprio sensu*, which can be sub-grouped into contractual issues and complaints regarding sector specific rules that impose obligations on undertakings;
- b) those concerning consumerism issues, and

⁶⁸ Decree-Law 156/2005, Articles 6(2) and 12.

c) those concerning the practice of an economic activity other than the providing of ECS, by a CSP or an agent or partner of a CSP.

In addition, a fourth group can be identified, aggregating vexatious or frivolous complaints. Of all these, only the complaints concerning the compliance by CSP with sector specific rules fall under the scope of the communications NRA. Consumer-related issues and the supervision of other economic activities fall under jurisdiction of other NRAs, while contractual matters remain the object of private law.

Yet, because competence to handle the complaints was established according to a market criterion, all complaints are sent to ICP-ANACOM. There's no previous filtering according to, e.g., content. What's more, it is the Authority's obligation to answer all complaints, including those it does not have jurisdiction to address. In these cases, the Portuguese NRA has chosen to inform end-users on its powers and role, on methods of conflict resolution available to them and about the users' general rights regarding ECS. The book makes use of the NRA's resources but keeps it to a limited participation in the outcome. It puts unjustified public expectations (and pressure) on the NRA, called to answer a great number of solicitations falling outside its jurisdiction, and pulls away valuable resources from complaints that are of its competency, lengthening their resolution.

For consumers, the impasse is similar. Able to voice their concerns, end-users expect(ed) not just a reply, but a solution. However, complaints aren't met with a solution analogous to that of a court or other dispute settlement body, because ICP-ANACOM has no jurisdiction to resolve them⁶⁹. Hence claimants are compelled to make new complaints or solicit one of the other NRAs for information – again, without obtaining formal resolution. This implies new delays and potential losses for consumers, negatively affecting their trust and satisfaction regarding the implemented system.

⁶⁹ Law 5/2004, Article 107, and ICP-ANACOM's Statutes, Articles 6(1)(q), 16(1) and (2) and 18.

On the other hand, complainants “misuse” the book, disregarding its formalities (some complaints extend for several pages; being handwritten, it gives a bleak view of the task of treating the data) and overlooking its scope and rationale (even appraisals may be found). Moreover, as no criteria exist to use the book, the likelihood of insistencies (repetition of the same dissatisfaction regarding the same facts) before the claim has had an opportunity to be dealt with, is higher. And, not uncommonly, disputes are solved by the parties before the NRA’s reply arrives.

Finally, this initial distribution of competence may generate conflicts of negative and positive authority, between different NRAs. This is especially true when the complaint concerns new technology or electronic services connected to the activities of more than one Authority.

The grave consequences of it are, however, best perceived when looking at complaint values⁷⁰. In 2005 ICP-ANACOM received, directly or indirectly, 3,754 complaints. Yet, in 2006, the first year with the book, a staggering 17,296 complaints were registered. Of those, 11,773 were reported via the complaint book (almost 70% of the total value), representing an overall increase of 361% regarding the previous year. In 2007 that number grew to 24,745 (with the complaint book accounting for 68% of that volume) and in 2008 it reached the 33,814 complaints (75% via the complaint book). In 2009, 41,989 complaints were registered⁷¹. Comparatively, complaints which actually fall under the scope of the regulatory Authority or another entity represent a marginal number⁷².

⁷⁰ Annex 2.

⁷¹ All statistical information retrieved from <http://www.anacom.pt/render.jsp?categoryId=315335>. The values presented refer only to complaints formalised in writing and include postal services’ complaints, as they do not alter the interpretation of the results and on a wider scale these services could have been integrated in this paper’s scope. Other types of solicitations such as information and statistical requests and petitions are excluded.

⁷² Though there is no official document wherefrom comprehensive values may be gathered, the analysis of the complaints’ content (Annex 2) allows extrapolating that few could amount to statutory or regulatory infractions. Another hint to the reasonability of this inference may be found in the following table, where under the second column are presented numbers for infraction proceedings carried out throughout 2009: http://www.anacom.pt/streaming/contra_ordenacoes_2009.pdf?contentId=335871&field=ATTACHED_FILE

4.3 Dissonances – consumers and the electronic communications market

“Conflict is the beginning of consciousness”,

M. Esther Harding

The relevance of the Portuguese example resides in understanding the reason behind the complaint increase and the general acceptance of the book despite its limited scope and outcomes.

On analysing the complaints rising, the numbers could translate a decline in quality, transparency and maybe even free competition within the Portuguese communications market, since 2006. Alternatively, it could be argued that the ubiquity and gratuity introduced by the complaint book solved a problem of accessibility to complain systems⁷³. Here, the dissatisfaction would have already been present in the market and the book merely allowed depicting that reality, introducing transparency and a chance for a real evaluation of the market’s quality.

Unquestionably, the book granted a practical meaning and efficacy to the right to complain. Yet that’s insufficient to justify the steady upheaval of complaints’ after 2005, especially when, prior to 2006, there were already in place complaint schemes by ICP-ANACOM and the DGC, consumer ADR mechanisms (namely, consumer arbitration centres), and IDR from CSP.

The lack of structural or noticeable internal changes in the market during that period (2005-2006), whether due to the entry of new CSP or the introduction of new services, sets aside market-based reasons. What’s more, the complaint increase didn’t register solely in

⁷³ A positive correlation between the perceived accessibility of information and information use has been noted in previous research: Swanson (1982); Maish (1979). In this literature, reference can be found to three dimensions of informational accessibility: reliability (certain, dependable, failure-free); convenience (close, convenient, nearby, and unobstructed); and ease of use (flexible, forgiving, understandable and friendly). The complaint book encompasses all three characteristics. On a more specific note, four principles have been highlighted regarding the accessibility of web content: perception, operability, understandability and robustness (<http://www.w3.org/TR/WCAG20/>).

geographical areas where a lesser availability or use of new technologies, such as the internet, could have until then hindered the exercise of the right to complain. It registered equally in urbanised areas, where consumer society is more tangible.

This paper suggests a third option. Consumer awareness of their rights, of the availability of different products and services, of substitutability and interchange, and of quality of service has been raised by media and social exposure.

There is research indicating that the “(l)evels of complaints are closely tied to expectations” and that “(a)ctive consumerism requires a level of literacy and education to be effective. (...) The well-informed, middle-class person knows how to complain (...)” but “the less well-educated person in the same position may not be able to achieve the same thing”⁷⁴. Though this is especially true for less developed markets, where the lack of alternatives (competition) and information can sometimes dictate higher satisfaction levels⁷⁵, it also finds an application in developed markets. The higher the awareness of one’s rights and of the channels to voice one’s dissatisfaction, the more likely they will be used. When to this is added a freely and immediately accessible information system, such as the complaint book, the starting point to understand the Portuguese case is found.

In parallel, the high number of complaints may translate an emotional response to frustration (the inability to solve the complaint on a face-to-face contact) and to a desire to feel empowered (by requesting the book, complainants create an official registry which is reported to the NRA, exerting pressure over CSP). It corroborates the conclusions in Section 3.1. This partly explains the book’s popularity, despite not offering remedy, and what seems a trend for a “growing gap between enquiries and complaints, with the complaint level continuously rising”⁷⁶.

⁷⁴ Southwood (2006), p.3 and 7.

⁷⁵ Southwood (2006), p.3.

⁷⁶

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33564/publicationFile/282/AnnualReport2004Id2043pdf.pdf>, Tables 1 and 2, p.1-2.

Likewise, it points to a saturation of information. Increased information availability creates the challenge of filtering that same information: the quality of the data retrieved is determined by its adequacy to the user's intended purpose. In other words, it has become difficult for consumers to assess their rights' scopes, as well as the adequate means for their exercise⁷⁷. Despite the informative effort, a great majority of consumers still believe that communications NRAs' supervisory functions include oversight of contractual matters concerning their provision contracts⁷⁸.

From a kinetic perspective⁷⁹, the scheme fails to address complainants' expectations of effectiveness. The NRA's answers are often tardy and offer no remedy; and where the CSP's customer service permitted conflicts to become long-standing or deemed them deadlocked, the book failed to make a contribution. From a consumer perspective, it is a redundant system. It creates optimal conditions for voicing end-users, but gives them no real means of action. Solutions reside, as with before the book, in dialogue with the provider, resorting to ADR on their own initiative or resorting to Courts.

Undeniably though, the book originates administrative costs that may find repercussion on the service costs charged to end-users (the 'waterbed' effect⁸⁰). Though some costs are higher in the beginning, decreasing over time, others are ongoing – the cost of the books, of sending the complaint-sheets to the NRA, of changes to the CSPs' customer service for implementing the new system and to log and deal with the increase of complaints, amongst others.

⁷⁷ This problem, noted by Spiros Simitis in 1970, is still poignant today, if the user of the information system lacks the required technical understanding to effectively use it or to assess the relevance or validity of the retrieved information. It raises transparency issues. Cfr. Bing and Harvold (1977), p. 233.

⁷⁸ Also noted in the German case:

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33564/publicationFile/282/AnnualReport2004Id2043pdf.pdf>, p.3-4

⁷⁹ The notion of kinetic consequences of law was advanced by Wolfgang Fikentscher, to express the need to contemplate the evolution and effects of law in its application, during the process of interpreting-applying norms. See Larenz (1997), p.340.

⁸⁰ In essence, the pressing down of prices or the absorption of costs in one part of the firm's operations leads to another set of prices to rise.

Though consumer education and some changes to the book's functioning could enhance its qualitative performance, its objectives and rationale may be achieved by more effective alternatives. It's this more complex ADR system that will be delineated next.

5 A new symphony: the workings of the scheme – a holistic approach

5.1 Accessibility: ubiquity, convenience, reliability and ease of use

Internet infrastructures and access are nowadays widespread in developed countries, with companies relying on electronic means and equipment on their daily routines. Even small establishments pertaining to a CSP will, as a rule, have or be able to have internet access on their premises. This can serve as a ubiquitous and easily accessible gateway to deploy a complaint scheme and may suitably replace more resources-consuming alternatives, such as the Portuguese complaint book⁸¹.

A computer present at store-points may be used to engage end-users in lodging complaints directly into an ICT system. To limit misuses, internet access may be restricted to the websites of the CSP and the communications NRA through administrative settings. Then, and to reinforce transparency, the path to lodge the complaint should be easily visible or intuitive for end-users when browsing.

In parallel, the inclusion on the operator's homepage or next to the electronic complaint-scheme of a direct link to the consumer information webpage of the NRA will facilitate and expedite end-users access to relevant information. This, together with a notice that these proceedings do not preclude further action (the NRA's complaint scheme, other ADR procedures or the legal system), may contribute to enhance consumers' trust.

In this model, the complaint mechanism available at a CSP's establishment is the same that can be accessed from home. This allows homogenising and standardising procedures,

⁸¹ Presently, there is a legislative effort to introduce an electronic complaint book, with a market-specialized scope and with complaints to be sent directly to NRAs. It is not yet clear whether it will coexist with the current book. A national network was also created to allow checking on the progression of complaints by claimants and doing searches of complaints per company (<https://rtic.consumidor.pt/publico>).

including complaint-handling services⁸², and may help tone down the initial impetus to complain by customers who don't find a satisfactory solution at the store. It gives them an opportunity to reflect on the situation and may give CSP adequate time to address the issue. Users can still complain from home, with the same ease and effectiveness and without additional loss of time, if the problem persists.

Though not a novelty, online filing (of complaints) and the use of new technologies as platforms of communication and data exchange have not yet become a tool explored to their full potential in ADR. Why this is so concerns mainly:

- business choices (costs related to implementing the necessary technological changes⁸³, staff training, maintenance and management of the system(s), security requirements⁸⁴, etc, or the access to or cost of the technology itself, in developing countries);
- the inability (including lack of technical or language skills) or unwillingness by the end-user to use ADR online platforms, and
- system restrictions incorporated into the platform by the system manager (the CSP or ADR body), hindering its flexibility⁸⁵ and limiting its usability by end-users.

In truth, though, ICT can have a tremendous impact in decreasing access barriers and equity concerns⁸⁶. Even the use of a computer as a gateway instead of a paper-type system allows complainants to benefit from software to overcome physical disabilities and the lack

⁸² Possibly lowering costs.

⁸³ Including new infrastructures, when needed.

⁸⁴ Some may be conducted to technical concepts and solutions that should answer the legal requirements of such a scheme. See Bonnet *et alia*s (2004). Others will relate to the particular normative implications of the choices made regarding the software and the system design (<http://www.juridicum.su.se/proactivelaw/NordicSchoolofProactiveLawConference2005.pdf>, p.2).

⁸⁵ Flexibility and simplicity are essential marks of ADR. Examples of these unnecessary restrictions are online limitations imposed to attaching documents to support the claim, requiring the sending of (physical) evidence through different communications means (namely post), or requiring evidence from claimants which would be fairly simple or costless for the CSP to obtain, but possibly difficult or costly for the service user.

⁸⁶ Several projects currently under development focus, for example, on e-accessibility and inclusive e-governance aimed at people with disabilities. See <http://www.w3.org/TR/WCAG20/>, on web content accessibility, and <http://www.eaccessplus.eu/>. Also, the surge of a concept of universal design, oriented towards "designing for a universality" of users: <http://accessit.nda.ie/useandapply/ict>

of literacy skills. Such tools are available for all operating systems⁸⁷. In Germany, the Bundesnetzagentur recently introduced measures for implementation of a text and video relay service for deaf and hearing-impaired persons⁸⁸. Its application, if extended to complaint-handling procedures, could further enhance the user's experience.

Though end-users may choose to immediately resort to a third-party to settle their claim, they should be encouraged to first engage their operators' IDR. Hence, when a different choice is made, the system in place should suppress the lack of opportunity given to the CSP to intervene (see ahead Section 5.4.1).

5.2 The CSP's complaint scheme

Opting firstly for the CSP's complaints-handling procedure(s) gives the parties an opportunity to jointly achieve a solution, promoting dialogue and accountability, while potentially uncovering systemic or business-model failures. The choice then falls in what standards should be demanded, if any, of such schemes, what results should be expected and, equally important, how to intertwine them with other ADR schemes⁸⁹.

5.2.1 Standards

A scheme minutely defined on a statutory or regulatory level, for homogenous implementation by all CSP, could deter operators from finding more creative and customer friendly solutions, hindering the use of customer service as a competition enhancer. The conclusions drawn above about a hard law approach prove applicable here as well. Conversely, not imposing minimum standards would jeopardise consumer protection (including, access to justice) and could determine the exclusion of special groups of consumers.

⁸⁷ Magnifier, Narrator (Windows), Orca(Linux), VoiceOver (Apple), etc.

⁸⁸ <http://www.bundesnetzagentur.de/media/archive/17343.pdf>, p.29. See also <http://www.tess-relay-dienste.de/>

⁸⁹ Section 5.4.

Establishing high minimum normative standards on a statutory or regulatory level, to guide the industry on the mapping of their customer service and complaint-handling culture/policies, might therefore present a best practice direction. Furthermore, it is easier to enforce against. This minimum assured, CSP are free to adapt their customer service to best suit their customers' needs and to create a company image. Though this minimum normative threshold may need some gradation to accommodate business cultures and the specificities of national markets, it can facilitate future harmonisation of standards or procedures on an EU level⁹⁰. More, it permits applying a homogenised level of protection to all consumers, disregarding of what CSP(s) they subscribe. It is the option being currently implemented in the UK, by Ofcom⁹¹, who assessed the benefits of introducing a single Code of Practice, approved by Ofcom, as opposed to the application of individual Codes of Practice by each CSP⁹².

5.2.2 Connection with other ADR schemes or the NRA's complaints mechanisms

Here too⁹³, an interconnection of the CSP's information systems with the NRA's, for automatic forwarding or reporting of complaints, is a solution too complex, costly and highly burdening for the market. Furthermore, it would achieve similar results to mechanisms such as the complaint book and could tone down the autonomy and independence of CSP's IDR, weakening their accountability and flexibility towards their customers.

Nonetheless CSP's IDR can be perceived as integrating a 'broader conflict resolution system', of which they constitute the first line of response. They are in a privileged position

⁹⁰ A pan-European web-based form for filing consumer complaints with an escalation procedure to ADR is presently being deployed, for cross-border disputes: <http://www.euroconsumatori.org/16854v16854d49857.html>; <http://www.euroconsumatori.org/16853.html>; http://cordis.europa.eu/fetch?CALLER=PROJ_ICT&ACTION=D&CAT=PROJ&RCN=62867 With a broader scope than the one envisioned in this paper, it may add stock to the choosing of principles and guidelines to adopt in a future harmonisation of B2C ADR procedures, in the European ECS market.

⁹¹ Ofcom (2010), Section 4.

⁹² Ofcom (2009), Point 4.11 and 4.8. Point 4.8 also expresses this paper's initially expressed concern over the exclusion of the consumer from the protection provided by the current two level system of regulatory and supervisory protection. See also Points 5.2, 5.4, 5.11, 5.17 and 5.19ss.

⁹³ See note 64.

to prevent dispute escalation, accelerate conflict resolution and diminish costs and losses for consumers. CSP must be required to recognise that responsibility and the need for their interdependence with other market mechanisms in achieving swift access to justice and effective consumer information/education (for which clearer and more transparent contracts are essential). But even within this holistic approach, there is still a want for an intermediary stage between CSP and the judiciary system, fostering industry compliance, consumer protection and dispute resolution accessibility and effectiveness. How these functions may be pursued will be discussed in Section 5.4.

5.2.3 “Consumer-Friendly” Contracts

Not uncommonly, subscribers receive a copy of the services’ general clauses or of the form they fill out, but not a ‘one-piece document’ aggregating those clauses, the specific terms where the contract departs from the general clauses (for example, where tariffs or contractual obligations/rights result from a time-limited marketing campaign) and other relevant contract terms (possible maintenance terms, service quality standards and penalties for their non-compliance, etc). Hence users are seldom aware of all particulars relevant for exercising their rights, even when written down in contract form. Even if consumers have access to the entirety of the applicable contract terms, it’s unreasonable to expect them to read them through and be proficient enough to extract the pertinent information to engage with their CSP fully aware of their options and rights.

Improvements here can carry a proactive effect. Together with keeping up-to-date contractual information available on their websites and at store-points, a shorter, simpler but more complete ‘one-document type’ version of that information should be supplied in durable form by CSP to subscribers, when entering into contract – a type of “consumer-friendly contract” (CFC).

While not to be underestimated, the burden or expenditure for operators to develop an aggregated version of the ECS provision contracts they already apply, in plain language and transparency-orientated, is likely reasonable, especially when compared with possible

consumer benefits⁹⁴ (hence, from a proportionality point of view). CFCs draw on the assumption that gathered (as opposed to scattered) and simplified valuable information may be more appealing to consumers, making it more likely to be read. Even if this reading exercise is conducted only at a later stage, it will simplify end-users' assessment of their rights and obligations, which in turn permits them to better evaluate their position, options and means of action. It intends to address the aforementioned difficulty in accessing and retrieving relevant information⁹⁵. The efficacy of this empowerment however depends on the setting up of adequate and efficient redress mechanisms to follow-up.

Though not dispensing all articulation with other juridical instruments, where they may be omissive, CFCs should enclose the basic information that constitutes the main consumer-affecting terms of the contract, in a "close to telegraphic"⁹⁶ manner. CFCs contribute to raising consumer awareness of contractual key points, furthering their ability to compare different offers. Concurrently they aim at putting the onus on CSP of demonstrating all relevant information was appropriately given to subscribers, especially with regard to contractual charges and compensation mechanisms. *Lex ferenda*, the consequences of not conveying such information could result in requiring demonstration of the secondary nature⁹⁷ of the omitted clauses or of the clauses' fairness, at risk of rendering them non-binding⁹⁸.

Templates of CFCs should be submitted by CSP to the NRA for approval of the type, extensiveness and simplicity of the information included⁹⁹.

⁹⁴ The reasoning mentioned in Section 3.2, regarding the advantages of increasing information on ADR, is also valid here.

⁹⁵ Page 30 and note 77.

⁹⁶ CFCs should be designed to provide maximum information with the simplest and shortest text possible, dispensing with legal jargon and flourished-type language.

⁹⁷ Clauses of which derive no charges or extra obligations for the user.

⁹⁸ In alignment with the Unfair Terms in Consumer Contracts Directive's rationale, especially Articles 3 and 6.

⁹⁹ In Portugal, CSP are obliged to submit general contract clauses to ICP-ANACOM for approval previously to their use: Law 5/2004, Article 39/4, and ICP-ANACOM's Deliberation on Guidelines on the minimum content...", Consideration II. The proposed submission is based in a similar consumer protection rationale.

In addition, incentivising the industry to lay down service quality standards and corresponding non-compliance compensations on CFCs will permit, on a conflict stage, to dispense with difficult evaluations of the parties' rights and obligations and to "automate" remedy awarding. This "automatic compensation" may be computed by the same information system used to collect and process the complaints' data, by crossing that data with a database containing the quality standards and penalties written down in the applicable CFC(s). The information system can be itself a tool of dispute resolution¹⁰⁰. When the data treatment and conflict resolution are performed by other than the CSP's IDR, whether governmental or private, CSP should be given a fair opportunity to contest the resulting automated award, namely by providing evidence in contrary to the facts reported by the complainant.

5.3 NRAs' complaint scheme:

Whether accessed directly or through a CSP's website, the area on the NRA's website for lodging a complaint should be linked to the consumer information section. An adequate use of the NRAs' resources requires consumers to be informed about their rights and options. Secondly, such information ought to be in plain language, transparent and comprehensive, and presented in a layout that suits the "transmission-media" and avoids alienating consumers. This could be achieved, for example, by:

- Setting a list of end-users' statutory and regulatory rights at the top of the page, each a link leading to a section down the page where those rights are further elaborated;
- Stressing the importance of reading ECS contracts, and
- Placing a notice, next to the list of rights, explaining that oversight of the contractual situations described does not fall within the NRA's scope of powers, but that contract-related disputes can be taken to their provider, an ADR system, consumer arbitration centres or Courts. Links should be provided to specific communications ADR, if

¹⁰⁰ Schultz (2003), p.3, and several literary references there included, especially footnotes 10, 16 and 17.

existent, and to other ADRs or consumer arbitration or mediation centres with jurisdiction over the content, along with basic information about each¹⁰¹.

If the issue is not listed, end-users may be welcome to contact the regulator, namely to request information. If desiring to lodge a complaint, they should be encouraged (but not limited) to using online complaint schemes.

5.3.1 Electronic case management systems¹⁰²

Electronic case management systems (ECMS) consist of software that enables the user to electronically manage cases' life cycles and treat data in an integrated way. They interconnect and interact with other software or systems, while more advanced ECMS are even able to perform tasks as intelligent agents¹⁰³, displaying more or less autonomy in their performance. Further, ECMS expedite access to and sharing of data, whilst also enabling establishing different levels of access and actions according to user.

In January 2007, ICP-ANACOM introduced a customised ECMS designated SGTSM for the handling of the market's solicitations, but it failed to connect it to any of its already available contact services. Indeed, web-based complaint lodgement forms (WCLF) are offered by businesses and government agencies worldwide, and the NRA itself has one such service: an online help-desk. Connecting the SGTSM to the online help-desk would have enabled the NRA to automatically process the information entered by complainants, accelerating proceedings in the initial stage¹⁰⁴. Furthermore, this connection could be extended to the email service, with equal benefits. The key principle is guiding end-users through the process, so as to guarantee the information provided is as complete and accurate as possible.

¹⁰¹ Namely, in fulfilment of E-Commerce Directive, Article 19(4).

¹⁰² Testifying the improvement these systems, such as Resolve, can represent, MacMillan (2009), p.3.

¹⁰³ Schiavetta (2008), p.444.

¹⁰⁴ Currently, the data is inserted on a case-by-case basis by administrative staff, after a pre-evaluation of each complaint by a competent officer or administrative worker, and templates have been uploaded to serve as drafts for the answers sent to end-users. It would namely save the staff re-reading the complaints, firstly to classify them and later on to work on them. In this final phase, corrections to the classification would still be possible.

5.3.2 Interconnecting WCLF and ECMS

WCFL should be intuitive, secure and simple to use. Though other options are certainly conceivable, a tree-type choice interface¹⁰⁵ allows narrowing the available choices on advancing through the form, guiding the complainant on the identification of the situation and facts to be reported. Interconnecting the WCLF with the ECMS has the potential to work as a content-based filter, while automating data insertion in the system: the choices made are registered as the complaint's classification. Just as importantly, it allows applying classifications the NRA already employs.

This raises the question of whether end-users are able to make a sector specific assessment of their complaints. Yes and no. It's reasonable to assume end-users will know whether their complaints fall into categories described by everyday terms, such as "client support", "equipment malfunction", "refuse of warranty" or "internet speed". Only sector specific problems could pose a challenge, but even some of these are easily recognisable. End-users might not know how to denominate a specific cabling or infrastructure problem, but most will know for example whether it fits into "infrastructures", and possibly even "antennas" or "phone posts". At the end, a blank field for inserting a short account of the facts would be available.

Concomitantly the interconnection of the two systems would enable:

- a) Immediate automated answers
 - for complaints devoid of juridical relevance (e.g., "long waiting time"), and
 - for complaints on contractual issues. Here the message should include an explanation of the NRA's powers and a link to its informative page. Alternatively templates used by the NRAs can be prompted, enclosing that link. If an ADR scheme is available, mention and basic contact information should be included with appropriate highlighting.

¹⁰⁵ To which other more complex interface designs can be added, such as drop-down menus.

- **Benefits:** increased workflow efficiency (attrition or elimination of “superfluous” steps in the case’s life cycle, e.g. the sending of an initial receipt notice informing of subsequent analysis); improvement of response time, avoiding additional end-user distress caused by lengthy waiting or lack of information on progress; and allowing users to be immediately aware of their options and to proceed in an informed manner.

- b) Automated transfer, for complaints falling under the jurisdiction of another NRA or governmental agency.

Benefits: speedier transfer of out-of-jurisdiction cases (reducing the number remaining at the NRA until analysis is completed).

and

- c) Recording of the data by complainants to their own system, either for copy retention or in draft-form to be completed and submitted later.

Benefits: providing complainants with a hard copy, facilitating future reference to it.

Normally then only potential administrative infractions pertaining to the scope of NRAs and cases escaping the available classifications would be left out of an automated answer, allowing their prioritisation. This not only increases NRAs’ capacity of response but also their time of response. The likelihood of infractions going unnoticed or prescribing due to lack of human and technical resources lessens. In these cases however, the scheme could still reply with a message informing that an assessment of the facts would be conducted, but that any decision by the NRA concerning the reported facts would not solve the actual conflict between the user and the CSP, nor set upon the provider any specific obligations, namely compensation. A link to the page listing contractual issues should therefore be provided.

Thus “filtrating” complaints, NRAs may decide:

- to treat them by sampling (i.e., to analyse a random sample of complaints to ensure the correction of their classification as introduced by end-users, with for example the option of always verifying complaints falling into certain categories – e.g., portability, infrastructures, suspension of service...), or

- to re-assess all cases,

(with further answers being sent, when necessary, in both cases).

Where multiple choice¹⁰⁶ occurs (whether of services or of content/issues), two framings are possible. Firstly, all the services or content issues reported are susceptible of one single treatment/answer (for example, the services have a similar juridical treatment of the issue(s) reported or all issues concern contract-related situations or juridically irrelevant matters). Secondly, some of the subjects complained have juridical relevance within the NRA's scope, whether that applies to just one or all of the services involved, while other subjects don't.

Either way, the solution requires the ECMS to prioritize subjects, in order to apply the correct message to the situation. ECMS can be customised to opt for the one with highest relevance, when confronted with parameters requiring different actions. If all parameters (the choices done) require the same treatment, the program will apply one common answer. If however some issues are of contractual nature and others deprived of juridical relevance, the message displayed should correspond to the contractual matters answer. Finally, if some subjects have juridical relevance for the NRA while others are merely contractual, then the solution would be the one applied to alleged infractions (which nonetheless includes a link to the informative page).

In summary, the requirements/features of an ECMS should ensure regulators a better performance. In addition to those already mentioned, it should:

- ensure accuracy on the interface level: a simple to use and understand interface must give comprehensive parameters of choice to end-users; the clearer (more specific) the system is made, the more complete the data extracted from it, boosting reliability;

¹⁰⁶ A multiple choice function in an ECMS simplifies the complainant's experience and offers advantages to NRAs at a time when many disputes concern complex webs of interrelated issues.

- be upgradeable to meet potential additions or changes (as well as to ensure its longevity, since continuous data loading into the system can potentially decrease its speed and workflow efficiency);
- store the identification data of complainants in association to individual complaints;
- allow the record of annotations and other entries on the cases;
- do docketing (log the chronological workflow of complaints);
- include a document library (for templates, finished documents, uploaded ones...);
- be able to link with external programs, i.e. any supporting tools or other software relevant for the cases' management (namely with the WCLF software, outlook, etc, as well as previous software used by the NRA);
- be flexible to recognise any standard document types;
- allow different levels of access according to case management functions, based on roles and responsibility and, eventually, on access to/by third party systems (for example, if the WCLF or the ECMS are acquired as web-services provided externally, or in the event of interconnection with other NRAs or ADR systems¹⁰⁷) – remote access can also be contemplated;
- incorporate case management methodologies (e.g., opening, closing, ascribing work to specific staff members, reviewing, re-opening and archiving of complaints), as well as create case management rules (e.g., rules to notify or alert, assign, remind, escalate, prioritise...);
- allow bulk-load functionalities (for example, sorting and creating packages for “bulk” treatment of cases with the same features or to enter cases into a CSV or XML file), and
- provide adequate privacy and data protection¹⁰⁸.

¹⁰⁷ Managing access levels within the system is essential not just for workflow purposes, but also security. If access to third parties is considered, for example, thought should be placed in creating a data sharing and protection agreement between the organisations which will be granted some level of access, to serve as the basis for those access requirements.

¹⁰⁸ For which it's relevant to know the standards used by the supplier of the ECMS for software design, development and customer support, including any independent accreditation standards, so as to ensure high quality service/product providing.

Other criteria, features and tools can be added. ECMS should be customised to NRAs' needs and CSP's business models. For example, a feature for obtaining parameterised statistic data facilitates detecting market irregularities, prompting a quicker internal report. When acquiring an ICT solution as this, nonetheless, it's important to negotiate system maintenance and support (namely, type of support included and/or provided past the roll-out¹⁰⁹ phase) as part of the package. This should encompass troubleshooting, staff training, database engineering and design upgrading, as well as user interface development.

To summarise, a dynamic WCLF, going beyond traditional e-filing, improves consumers' experience¹¹⁰, while achieving flexibility and optimising data integration into the NRAs or CSP's database. The data becomes readily available and workable. Complementarily, an effective ECMS improves workflow quality, resources use and the overall response time.

Though cost considerations may weight against the implementation of such ICT changes, they also carry benefits and reduction in expenditure. In a nutshell, and additionally to other advantages mentioned above:

- “lower cost of processing submitted forms, lower postage and mail handling costs, fewer data entry errors”¹¹¹
- enabling to “build data validation, error checking and calculations into the form, improve standards of legibility and completeness of submitted forms and create dynamic questioning fields which (...) show users the fields they need to complete”¹¹² or opt between
- decreased risk of files misplacing and enhanced data and file sharing (enabling, e.g., more than one officer to work on the same file at a time)
- elimination of need for much paper storage and archiving

¹⁰⁹ Testing, implementation and set-in-practice of the software.

¹¹⁰ Facilitating inclusively the offer of multi-language settings.

¹¹¹ See <http://en.wikipedia.org/wiki/SmartForm>.

¹¹²

http://smartforms.business.gov.au/developer/index.php?option=com_content&task=view&id=68&Itemid=99

- lessening of administrative costs connected to case management (from copying costs to staff hours)
- support of regulatory compliance (by creation of rules to generate notification of cases fulfilling a conditional set of parameters)
- improved risk management, by providing timelier solutions and avoiding administrative infractions to overdue, and increased productivity, both of which have a budgetary reflection.

Moreover the increasing availability of open source ICT solutions and of compatibility software makes it progressively more sustainable to adopt such systems, further lowering potential costs of ICT reform or change. Brazil stands as an example in this adaptability, engaging open source solutions to “overcome distance and socioeconomic challenges”¹¹³.

In Australia, the government is investing in the implementation of ICT solutions similar to those proposed. Resorting to both “Smartform” technology (a denomination for WCFL crafted by the Australian government to describe the dynamic and interactive nature of these web forms¹¹⁴) and ECMS, they aim at “[providing] people with simple, convenient access to government information, messages and services”¹¹⁵, while rendering overall better governance and transparency. With “a \$42.4 million Budget initiative”¹¹⁶, the Australian government has been encouraging the adoption of ICT reform measures which are focused on consumer-service delivery, while introducing better coordination between government agencies, better utilisation of ICT assets, increasing standardisation of data and simplification of procedures. Though yet at a sub-optimal level on reaching the set goals

¹¹³ Gershon (2008), p.43.

¹¹⁴ <http://en.wikipedia.org/wiki/SmartForm>

¹¹⁵ <http://www.finance.gov.au/e-government/service-improvement-and-delivery/agosp.html>

¹¹⁶ *Ibidem*. This value does not aggregate the ICT spend of specific agencies to comply with whole-of-government directives or to implement ICT reform.

and cost return¹¹⁷, the benefits of using this type of technology are already measurable in some cases¹¹⁸.

Similar approaches have been developed in Portugal by, namely, the Tax General-Directorate. On the ECS market though, ICP-ANACOM opted for introducing the SGTSM and creating the End-User Support Unit, to address the continuing workload increase, whilst outsourcing services to deal with the administrative aspects of processing complaint data. In its Strategic Plan for 2009-2011¹¹⁹, the regulator declared its intention to create an independent national arbitration centre, with specific expertise for the settling of communications services B2C disputes, subject to the Ministry of Justice's approval.

Though the specific workings of the arbitration centre are not yet published, the proposal followed an evaluation of CSP's IDR and aims at being an alternative to Courts, simpler and less expensive. In parallel, it strives to lessen costs associated with B2C complaint-handling by the NRA¹²⁰, but leaves current system inefficiencies unanswered¹²¹. With an initially prognosticated budget of € 250 million¹²², it has since been amended to € 500 million¹²³, making the arbitration centre a costly solution and creating pressure for its efficiency to bring a return of the costs.

5.4 Independent ADR bodies and NRAs

The solutions so far proposed are pre-conditions to better ICT governance and sustainability, in view of a more efficient B2C ADR. Yet they leave unaddressed the issue

¹¹⁷ Namely attributable to a "model of weak governance of ICT at a whole-of-government level and very high levels of agency autonomy, characterised by an ability to self-approve opt-ins to existing whole-of-government ICT arrangements". Gershon (2008), p.5.

¹¹⁸

http://smartforms.business.gov.au/developer/index.php?option=com_content&task=view&id=68&Itemid=99
¹¹⁹ http://www.anacom.pt/streaming/plano2009_2011.pdf?contentId=741678&field=ATTACHED_FILE.

¹²⁰ *Ibidem*.

¹²¹ Above Sections 4 and 5.3.1.

¹²² http://www.anacom.pt/streaming/plano2009_2011.pdf?contentId=741678&field=ATTACHED_FILE.

No indication is given on how this value might find repercussion on the market, either for CSPs or end-users.

¹²³ Strategic Plan for 2010-2012,

http://www.anacom.pt/streaming/plano_estrategico2010_2012.pdf?contentId=973441&field=ATTACHED_FILE

of contract-related complaints¹²⁴, which constitute the bulk of complaints received by regulatory authorities. The continuous request by end-users' for NRAs' intervention, even when aware of the regulators' lack of powers, indicates a general perception of lack of efficient and effective means in the ECS market to handle this type of complaints.

Truthfully NRAs are, as mentioned *supra*, in a privileged position to investigate and resolve ECS claims. Yet their official powers would dictate the procedures' dynamic¹²⁵: NRAs would be bound to pursue public policy issues with priority over or even in detriment of the parties' positions¹²⁶; their impartiality and integrity could be questioned through the motivation behind their decisions (especially when an indirect financial interest of the regulator or the state is involved¹²⁷), and it would require a redesign of the regulators' purposes, powers and resources, to take in contractual and consumer disputes. Hence, though the traditional role of NRAs within B2C dispute resolution should be re-evaluated, it would serve a better purpose by assisting in and complementing ADR than by emulating the judicial system.

As it is, the complexity of the ECS market's relationships justifies the creation of a market-specialised ADR body, with an experienced and appropriately trained staff of experts at its disposal. It is the solution being employed, to different extents, in the UK, Germany or Canada¹²⁸, and currently pursued by Portugal.

Such a body must be independent – from governments, NRAs, CSP, consumers and other market stakeholders alike. Independence is critical for impartiality and the two are crucial for accountability. However that does not exclude the possibility of incorporating a consultation office or organ, constituted by representatives of the different market interests, in order to voice their different concerns, advice on general policy or reform, and even for

¹²⁴ Including customer service complaints.

¹²⁵ ITU (2004), p.64, Box 5-1.

¹²⁶ Inclusively the parties' need for confidentiality.

¹²⁷ ITU (2004), p.64, Box 5-1.

¹²⁸ <http://www.crtc.gc.ca/eng/home-accueil.htm> For a list of relevant decisions and documentation on the mandate of the Commissioner for Consumer Complaints: http://www.crtc.gc.ca/PartVII/eng/2007/8665/c12_200711748.htm; <http://www.ccts-cprst.ca/>

non-binding consultation on specific proceedings. Then the body must fulfil a minimum set of standards and principles to guarantee accessibility, flexibility, autonomy and procedural fairness (Section 4.3).

Because its specific legal nature can dictate very different solutions on its scope of powers and activity¹²⁹, the following analysis will refrain from adhering to specific legal types, concentrating instead on its interrelation with the market's stakeholders.

5.4.1 Main functions and interconnection with the ECS market

The model here proposed anchors on the assumption that mechanisms like the complaint book would be eliminated, in order to optimise resources and the results of the proposed ADR. Nonetheless, if kept, the functioning of such mechanisms should be redesigned to allow complaints there lodged to be directly sent to the ADR body. Similarly, an ECMS along the lines of the above-described would enable NRAs receiving contract- and consumer-related complaints to create a rule to automatically forward them to the body. Both measures would attenuate inefficiencies. In the Portuguese case, and more so if the ADR centre is approved and the book kept, the deriving inefficiencies may only be overcome by a delegation of competences by ICP-ANACOM (either by keeping the processing of the complaints' data to itself and delegating on the centre the answering and solving of disputes, or by charging the arbitration centre with responsibility over the whole process and having it forwarding back complaints pertaining to its jurisdiction).

5.4.1.1 Accessibility

In harmony with the previous conclusions, complaint reception should be done primarily by electronic means (namely, by interconnecting an email or dynamic interface WCLF with an ECMS). These have the potential to decrease physical, social and territorial barriers. The

¹²⁹ Arbitration or mediation centres, arbitration courts, ombudsman agencies, contact centres (akin to Egypt's NRA Contact Centre, but independent of the NRA and with broader inquisitive powers – Southwood (2006), p.15) or even consumer bureaus, that are more than “passive recipients of complaints” (along the lines of Nigerian regulator's Consumer Affairs Bureau and Consumer Parliament, which, if conferred B2C limited supervisory powers, could have an even more effective role in solving consumer conflicts – *ibidem*, p.15)

Internet Corporation for Assigned Names and Numbers (ICANN)'s Uniform Dispute-Resolution Policy¹³⁰ (UDRP) is a clear example of the advantages of employing electronic-based complaint procedures¹³¹. However helpline services and post reception should be kept available.

Secondly, consumers should be required to resort to their CSP's IDR on a first instance. This will contribute to avoid complaint escalation to a conflict stage when CSP have not yet had an adequate opportunity to intervene. Hence access to the ADR body should be conditioned by demonstration of that attempt¹³². If no such effort was made, the ADR body (henceforth, Body) ought to automatically forward the complaint to the relevant CSP, whilst on cases of insufficient information and frivolous complaints, it should contact the complainant to request further information or provide an informative answer clarifying why the subject was deemed closed.

Other type of access limitations, namely legitimacy issues, should be clear, publicised next to the general public and informed to complainants who don't fulfil the necessary requisites. Out-of-jurisdiction complaints would be automatically forward to the competent authority, when existent.

5.4.1.2 Duties and proceedings

The Body would be incumbent on analysing all complaints and logging their data. Hence the classification used by the NRA can be adopted here, facilitating data retrieval for statistic purposes and the homogenisation of approaches. Furthermore, logging will permit establishing a timeframe for resolution by CSP.

¹³⁰ <http://www.icann.org/en/udrp/udrp.htm>

¹³¹ Its inherent dematerialisation, ubiquity and speeding up of proceedings have translated into *circa* 20,000 claims lodged with the UDRP – <http://www.icann.org/en/udrp/proceedings-stat.htm>. More recently, a completely paperless procedure was introduced, being positively received: <http://www.wipo.int/amc/en/domains/firsteudrpdecision/>

¹³² It should namely be set as a mandatory-answer field in the WCLF. Ofcom makes a similar requirement; see below.

Consequently, the Body would forward a copy of the complaint to the respective CSP, notifying it/them of the proceedings and their general terms, and also to the NRA on alleged infraction cases. This paper suggests setting aside too strict procedural rules here, and allowing differentiating each case's handling based on how long-standing the complaint is and its complexity (though in the beginning this imprint of flexibility may cause some degree of inconsistency, it'll plausibly diminish as the process matures).

Hence, depending on the complaint-subject, officers could determine, within a pre-set timeframe, a maximum period for either of the parties to report the complaint's resolution or for the CSP to provide evidence of the lack of facts supporting the claim. If the complaint wasn't formerly presented to the CSP, a wider timeframe should be applied than if the CSP was already aware of the complaint for 2 or more weeks or had deemed it deadlocked (irresolvable). Similarly, more complex cases should be given longer resolution timeframes than simpler complaints.

The produce of evidence by electronic means and the carrying out of the procedure online should be a chief objective when designing and implementing the system. This entails the parties should be able to conduct the subsequent procedural phases via the Body's WCLF. Namely, CSP should respond using the platform; a well crafted response form will not only permit attaching evidence, but be concise and precise enough to enable the ECMS to collect the relevant information and automatically cross-check it with the data of the initial complaint. This not only facilitates the subsequent evaluation of the case, but most importantly permits the system to assist in the procedural steps. Accordingly, the system should be devised to automatically generate passwords linked to the claim for each of the parties, as they engage in the proceedings, including third parties¹³³. This way the parties may inclusively access their personal data to update it and check on the proceedings' progress. To incentivise CSP to use the online platform to take part in the proceedings, a fee should be charged when resorting to more traditional methods, such as simple e-mail or post.

¹³³ The NRA might be asked to provide evidence for example, on a portability-related dispute.

a) Burden of proof

The burden of proof is here primarily set on the operators' sphere. It'll generally be simpler and less onerous for them to produce registries and other evidentiary data than for end-users. Moreover, the evidence is necessary to substantiate the CSP's position, incentivising operators to cooperate in an efficient and timely manner.

Hence, complainants will have the burden of persuasion, except where a shift of the burden of proof is required to address specific situations where that simplicity or burdening would be far greater for CSP than for end-users. It's the case of a non-payment dispute: it will be easier for end-users to prove they paid, than for CSP to demonstrate they didn't receive for their services. This shift mechanism ensures fairness and the equality of the parties, though evaluated and applied on a case-by-case basis.

Other situations may amount to a negative burden of proof, but there too CSP are likelier in a better position to provide the necessary evidence. Examples of negative burden of proof exist in varied dispute resolution or litigation systems, such as the UDRP¹³⁴, and can be counterbalanced, when adequate, by a shift of burden of proof, as described above.

Legal presumptions might also play an important role. Consider a dispute over suspension of phone service for failure of payment. If the complainant alleges not having received a bill or notice of suspension, it may be complex for CSP to demonstrate they sent the bill(s) and/or notice(s). This may result in a statutory infraction procedure against the provider conducted by the NRA. Though operators can allege they regularly send out bills to their subscribers, according to a more or less automatic procedure, it may not suffice to disprove the claimant's allegation, especially if erroneous personal data (such as wrong name or address) is also disputed. In such cases, the establishment of legal presumptions, with an application limited to the Body's procedural system, may incentivise operators to introduce better business practices that safeguard their interests, alongside those of their subscribers.

¹³⁴ According to Article 4 of the UDRP's Policy (<http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>), it is up to the complainant to prove the respondent's bad faith, while the respondent has the task of proving his own legitimate interests or the complainant's lack of legitimacy.

Though legal presumptions can be disputed by disproving the presumed fact¹³⁵, they can have an overall positive impact, both by accelerating proceedings and fomenting dispute prevention (by urging the adoption of better business procedures).

After being notified of the complaint, operators may still opt to resolve the issue directly with the claimant. Oppositely, they may provide evidence contesting the claim. In that case, the staff will mediate, arbitrate or close the conflict, in accordance with their findings and the parties' willingness to review their position or the need to adjudicate a solution:

a) No answer from CSP to the Body:

New notice by the Body for CSP to relinquish evidence, within 5 working-days, to support their position or to comply with the claim (and here, the Body should have powers to change or partly dismiss the complaint, if it is clear part of it is unfounded or that, legally, the solution is different; similarly, it should review the pecuniary value of any compensation requested, if visibly inadequate and superior to what the produced evidence and the established facts indicate).

If CSP comply, application of b) or c);

If CSP do not comply, the evidence sought should be construed in favour of the claimant and the decision rendered according to the Body's evaluation of the fairness and merit of the claim.

b) Notification of case closure to the Body by either of the parties (due to conciliation between them);

c) Contest of claim by CSP, with produce of evidence:

- i. the Body may require the claimant to respond or produce further evidence to support his claim. If the claimant does not refute, the Body proceeds to rule by adjudication; if the claimant refutes, the Body attempts mediation if the facts or the evidence aren't clear and the parties are willing to review their position, or proceeds to arbitration.

¹³⁵ An equity safeguard.

Mediation: if one of the parties withdraws permission for mediation or no solution is reached after 1 month – adjudication procedure.

Adjudication: Each party chooses a panellist-member, with the Body assigning the third member, or the parties agree to adjudication by a one member panellist, assigned by the Body. Before a final ruling, it should communicate to the parties which facts were proven, disproved or remained unclear. Or

- ii. If the facts are clear – adjudicatory decision¹³⁶.

All decisions should be duly substantiated, explained and communicated to both parties, preferably through electronic means so as to permit record of the transmission data (the same should apply to other notifications during the proceedings).

When complaints are found in favour of end-users, CSP are notified, along with the decision, of the period for compliance and the consequences of non-compliance. Once past that period and if no review or appeal notifications are presented to the Body, the non-compliance is communicated to the NRA and the CSP. The NRA then initiates a regulatory infraction procedure for non-compliance and, if alleged by CSP, verifies the observation of procedural rules by the Body. If no due process flaws are found, the NRA issues an order to enact the decision, levying a fine for non-compliance.

This requires a statutory empowerment of NRAs to check the observation of procedural rules by the Body and oversee compliance with its decisions. Because there's no merit review, it does not require a change of the NRA's competences towards consumer protection and B2C dispute, nor does it compromise the Body's independence and autonomy.

In the Portuguese case, ICP-ANACOM is empowered, under its Statutes, Article 16(3), to “recommend or determine to the concessionary or licensed entities the necessary steps to be

¹³⁶ Annex 3.

taken to resolve just complaints by users.”¹³⁷ Hence the NRA can voice opinions on complaint-handling by CSP and may advise the creation of a specialised ADR body, with mandatory membership by CSP. Consequently, though requiring a specific attribution of powers to act, the ICP-ANACOM’s review of due process compliance by the Body may be justified under that norm.

In turn, in the United Kingdom (UK), Ofcom has implemented the obligation for all CSP to adhere to an Ofcom-approved ADR scheme, in addition to complying with the Ofcom-approved Complaint-Handling Code of Practice. These ADR schemes are to be free of charge, transparent, effective and be easy to use¹³⁸ by consumers¹³⁹. So far, Ofcom approved two ADR schemes: the Office of The Telecommunications Ombudsman (OTELo) and the Communications and Internet Services Adjudication (CISAS)¹⁴⁰. Both are fully independent of CSP and Ofcom. “If a complaint has not been resolved within eight weeks (or the C[S]P acknowledges the complaint is ‘deadlocked’), a consumer can make an application to the relevant ADR scheme”, “which has the authority to examine the case and make an appropriate judgment[. This] could potentially include a financial award and/or requiring the C[S]P to take necessary action. While C[S]Ps are bound by the decisions of the ADR schemes, consumers still have the ability to pursue their dispute through the legal system if they remain unsatisfied with their outcome”¹⁴¹. For each referral to ADR, the complained CSP pays a pre-established fee. The schemes have rules in place to reject frivolous and vexatious complaints, thus curbing abuses by complainants.

Conversely, in Germany, RegTP offers a B2C conciliation scheme¹⁴², under the Telekommunikationsgesetz 2004 §47a (TKG), open to written complaints alleging contract breach of statutory rights granted to consumers, if no judicial or other ADR proceedings

¹³⁷ ICP-ANACOM, Statutes, *infra*.

¹³⁸ Communications Act 2003, Section 52(3).

¹³⁹ Note 22.

¹⁴⁰ Respectively, www.otelo.org.uk; www.cisas.org.uk. For a summary of their functioning, Ofcom (2009), Point. 4.10-4.11.

¹⁴¹ Ofcom (2009), Point 4.11.

¹⁴² Schlichtungsstelle der Bundesnetagentur, aggregating the Schlichtungsstelle für Telefondienste and the Schlichtungsstelle des Vereins sicherer und seriöser Internetshopbetreiber e.V.

concerning the same matter are pending. The procedure, established in SchilO2008¹⁴³, is voluntary and ends when either of the parties decides to step down. If the proceeding succeeds, a non-binding well grounded agreement is issued, based on the evidence provided, the law and the parties' statements. Proceedings may be turned official if evidence of practice of a statutory infraction is brought to light. To ensure the seriousness of the complaint, procedures are subject to a fee payment, gradated according to the complaint's value¹⁴⁴, which is divided between both parties and payable once the defendant agrees to take part. Interestingly, it has been noticed end-users are more willing to make use of online tools and carry the proceedings electronically than CSP¹⁴⁵.

Germany's approach focuses on the voluntariness of the parties' participation, merged with an active engagement by the NRA itself on the resolution of the complaints which fulfil the scheme's criteria. The UK's, on the other hand, puts emphasis on ensuring a normative minimum to safeguard complainants, despite the nature of the complaint, by establishing mandatory membership by CSP, approving the authorised ADR schemes and the gratuity of the proceedings for end-users. Both require a previous attempt by claimants to address the issue with their operators.

There are consequences to these divergent approaches. Within the German context, the number of complaints being brought to conciliation represents a minute margin of the total of complaints (516 out of 44660 complaints, in 2008,¹⁴⁶ for example), and a large percentage of these either fail to fulfil the admission criteria or to gather consent to participate by CSP¹⁴⁷. The disparity between the total of complaints and those reaching conciliation has resulted in the Agency being increasingly "required to take unrestricted

¹⁴³ Schlichtungsordnung § 47a Abs. 4 des Telekommunikationsgesetzes

¹⁴⁴

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/147956/publicationFile/276/AnnualReport2008Id17343pdf.pdf>, p.42

¹⁴⁵

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33570/publicationFile/278/AnnualReport2007Id14147pdf.pdf;jsessionid=9215590869946670595BBE6CD489F3BC>, p.46.

¹⁴⁶

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/147956/publicationFile/276/AnnualReport2008Id17343pdf.pdf> - p.22.

¹⁴⁷ Ibidem, p.42ss.

action as an ombudsman”¹⁴⁸. Subsequently its scope of action has been the object of discussion¹⁴⁹. RegTP’s scheme represents, nonetheless, a positive departure from traditional conceptions of communications NRAs’ role concerning B2C. Its active participation in the dispute resolution itself, though in very limited terms, may constitute a beacon for future legislative reforms in the EU.

Oppositely, the UK’s more complex structure encompasses consumer/contractual complaints, which is of the utmost relevance as these tend to constitute the chief part of registered complaints (both with CSP and NRAs) and likely have considerable economical significance (though no values were available for the British market, the matters in dispute registered in 2007¹⁵⁰ by RegTP amounted to € 81,930). However the system in place raises concerns of “forum shopping”, as CSP are free to choose between the available approved ADR schemes; it keeps the NRA at a distance of the procedures, intervening only in statutory infraction cases, and denies CSP external review or appeal.

The structure here proposed attempts to enclose the positive experiences of different systems. Simultaneously, it strives to correct the inefficiencies derived of the segmentation of roles within the European ECS market’s B2C dispute settlement. For that purpose, the Body’s legitimacy and performance require:

- The attribution of powers to handle contract and consumer B2C disputes, amongst others that may be specified, within the ECS sector, and to dismiss or close cases with no legal ground or where bad faith is proven (the proceedings should contemplate a “bad faith sanction”, conducive to the application of a warning or the payment of a fine);

¹⁴⁸

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33570/publicationFile/278/AnnualReport2007Id14147pdf.pdf;jsessionid=9215590869946670595BBE6CD489F3BC>, p.46-47.

¹⁴⁹

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/147956/publicationFile/276/AnnualReport2008Id17343pdf.pdf>, p.43.

¹⁵⁰ 604 cases, of which 386 had no direct monetary value.

<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33570/publicationFile/278/AnnualReport2007Id14147pdf.pdf;jsessionid=9215590869946670595BBE6CD489F3BC>, p.46.

- Procedural rules setting distinct timeframes in accordance to the complaints' subject (classification of content), for producing evidence and for the subsequent procedural phases. A subsidiary timeframe should be determined for subjects not fitting the specified typology (without preclusion of extension when justified by the facts' complexity). The procedural policy and rules should be sent to all CSPs prior to the Body's beginning of functions, and subsequently to all new operators, and be kept available online;
- Attribution of powers to investigate claims and request evidence from both parties;
- Mandatory participation or membership by CSP;
- Binding nature and enforceability of decisions. Merit review should be limited to a special internal panellist and appeal to Courts;
- Expected timeframe(s) for reaching a decision;
- Effective "self-enforcement" mechanisms (bad faith penalties; case ruling despite no response or relinquishing of evidence by the parties; publishing statistics on CSP's cooperation, ranking CSP's by highest number of complaints – *per* subject or in total – or with the averagely longest standing complaints¹⁵¹, etc), and
- Oversight mechanisms through official channels (ability to report to NRA cases of non-compliance by CSP with final decisions; the non-compliance must therefore constitute an infraction under the NRAs' jurisdiction).

b) Confidentiality

Essential to build the parties' trust, willingness to participate and cooperation, confidentiality would be severely compromised if the parties feared a report to either the NRA (for example, of infractions by CSP or of situations contending with public policy issues) or other authorities. Hence past the initial moment of forwarding complaints pointing to alleged infractions as they are reported by end-users, the Body should assure the parties the confidentiality of the proceedings. It is relevant to procedurally specify which

¹⁵¹ All of which reflect on reputation.

aspects fall under this secrecy and any limitations in place (e.g., disclosure of information relevant to public health and safety hazards).

c) Precedent

Precedent¹⁵² increases legal certainty and predictability. Yet its creation should not be demanded of ADR systems as it is of Courts. Because it requires the publicity of decisions, precedent would compromise the private nature of ADR proceedings and introduce rigidity regarding the possible outcomes and, even, regarding procedural formalities. This can potentially diminish ADR's efficiency and appeal to the parties. On the other hand, it would imply reshaping the purposes of ADR. ADR systems do not aim at building binding case law, but at solving disputes swiftly according to the parties' needs and interests, whilst observing their legal rights.

Within the presented model, with the exception of potential negotiated settlements based on the parties' personal interests, the Body is bound by statutory and regulatory law concerning the parties' rights and obligations, and is obliged to verify and uphold contractual compliance. Furthermore its decisions are susceptible of procedural review by the NRA and of appeal to the judicial system. This contributes to ensuring procedural fairness.

Nonetheless, it is possible to strengthen ADR regulation by improving transparency, where it does not contend with confidentiality. The Body should, namely:

- substantiate its decisions, even when these result from an "automatic" application of regulatory or contractual norms, including breaking down and explaining any attributed compensation;
- issue "explanatory memorandums"¹⁵³, clarifying the Body's interpretation of its own internal rules, of how it may be expected to deal with certain matters, what type of

¹⁵² Black's Law Dictionary, p. 1059 (5th ed. 1979)

¹⁵³ Similarly, in Jordan, the Telecommunications Regulatory Commission (ITU (2004), p.31)

cooperation it expects from the parties, of its understanding of what may constitute bad faith by the parties, etc;

- keep a public listing of decisions relevant for future disputes, for and limited to their addressing of procedural rules, of the parties' legitimacy, the decision's enforceability and remedy awarding, or concerning substantive rights and obligations of the parties or contractual interpretation by the Body which transcend the specific case, etc;
- keep and publish statistics concerning its performance: e.g., number of complaint entries, on common contents, on cases solved without active collaboration from operators, on cases entirely conducted via the WCLF (i.e., online), average time for resolution, etc, and
- keep and publish statistics on non-compliance by CSP, of cases reviewed or appealed, and of decisions overthrown.

It is also conceivable that statistics on CSPs' "good practice examples" within the proceedings should be kept, both as a boosting benchmark and a promoter of consumer awareness on overall quality of service. It could namely highlight the fastest settlement-achieving operators or those with consumer-friendliest approaches (regarding relinquishing of evidence, customer care's openness to cooperate with the Body or the complainant...). This contrasts with the statistics gathered for leveraging "self-enforcement" by the Body.

To finalise, a few considerations are required on the nature and legal force of the Body's decisions. As no preference was taken as to the Body's legal form¹⁵⁴, the discussion of its legal status has to be connected to its purposes and activities. The Body provides a dispute settlement system, guided by and bound to legal principles and procedural rules which aim at ensuring the Body performs its functions adequately and in a way analogous to a court of law. The exceptions are a consequence of specificities resultant from more flexible and speedier proceedings. There are drawbacks, namely on due process and fair trial assurance, yet these can be answered through additional procedural safeguards, through choices made on the structure of the system and through regulation. Further, the Body applies substantive

¹⁵⁴ Above, note 126.

law and upholds contractual compliance, as mentioned above. Thus, the Body can be perceived as a forefront of the traditional court system, increasing access to justice.

The nature and legal value of its decisions must, therefore, be supportive of this view. The Body's decisions are not administrative decisions but analogous to judicial decisions. Its procedures are structured to result in a binding solution: when negotiation or mediation is successful, a binding agreement is drawn. This agreement, private in nature, should be enforceable both through the Body's mechanisms and courts¹⁵⁵. When they fail to succeed or the parties opt to not participate in negotiation or mediation proceedings, a binding adjudicatory decision ensues. Though limitations were established regarding the creation of precedent and to uphold some degree of confidentiality, which contrasts with the openness of published court decisions, other transparency-enhancing measures were put in place. Firstly, it should be noticed that even concerning the judicial system, there is a principle of secrecy of justice prevailing, when applicable, over the principle of open justice (think for example of court-approved secrecy agreements or court cases which involve especially sensitive matters concerning the parties)¹⁵⁶. Secondly, the Body publishes varied statistical data and keeps a publicly available database of its decisions or parts of decisions carrying future relevance, including its explanatory memorandums. These published elements aim not only at enhancing transparency or informing and educating consumers, but also at being used as future reference (for example, for future citation either by the Body or one of the parties). While explanatory memorandums are fully binding for the Body, its previous decisions are not but should only be disregarded when, through a special effort of substantiation, the Body demonstrates that in a new case the *ratio decidendi* cannot be the same¹⁵⁷. Once more, it highlights the importance for the Body to clearly and fully substantiate its decisions, namely as a disincentive to reviews and appeals. The resulting growing body of decisions will over time contribute to a lessening of inconsistencies and to

¹⁵⁵ This underlines the need to make the Body's decisions recognisable and homologated by a court, if a judicial appeal is brought about.

¹⁵⁶ An evidence of this is Bill 623, presented to the US Senate and nicknamed 'Sunshine in Litigation Act 2011', which attempts to limit the possible scope of judicial secrecy. <http://thomas.loc.gov/cgi-bin/query/z?c112:S.623.IS:#>

¹⁵⁷ It is an expression of *jurisprudence constante*: Black's Law Dictionary, 8th Edition, p.2501.

a fairer and equal treatment in future cases. On a parallel point, there is a need to make the search engine for this database user-friendly and accessible in the senses discussed above. Externally, the Body's decisions legal value is touched upon in Section 5.5.

d) Reporting

There is some degree of reporting to the NRA within the system, as a consequence of the periodical sending of statistical data on complaints and the Body's performance. Additionally, consideration may be given to establishing a duty for the Body to respond to clarification requests by the NRA on the statistical data or even to information queries, insofar as they do not compromise the Body's independence or the proceedings' confidentiality. This is desirable for its potential to enhance the transparency of the Body's procedures and increase its de facto legitimacy (including its trustworthiness with consumers).

On the other hand, the NRA may intervene in the procedures as a third party, namely by providing evidence or by invitation, with the parties consent; it carries out procedural oversight, and contributes to the enforcement of the Body's decisions. It is these participations which require especial prescriptive guidance. Though its review is merely procedural, the NRA is not bound by the Body's findings or decisions, meaning it may opt to initiate its own procedures on the account of substantive matters of its competence. This may translate itself into an investigation of possible statutory non-compliance by the CSP or issues where the NRA understands pressing public interests to be at stake. A possible conduct to adopt here is creating a "notice of interest", by which the NRA in a substantiated manner informs the Body, respectively, of its need to access the initial complaint¹⁵⁸ (and possibly other initial complaints reporting the same incident), or of the

¹⁵⁸ It presumes there were no initial signs of a statutory infraction in the complaint that initiated the proceedings; otherwise the Body would have been bound to forward a copy of the complaint to the NRA after receiving it. From the initial complaint on, the procedure's confidentiality should prevail. Notice this does not incapacitate the NRA from investigate and require further evidence from the parties.

reasons for its concerns and the public order or policy issues it believes deserving further consideration by the Body¹⁵⁹.

e) Funding

The discussion of implementation costs and their allocation exceeds the scope of this paper. Yet a brief rundown of the concerns surrounding funding is of relevance, due to possible implications on the Body's independence and impartiality.

Funding may be guaranteed through business or governmental sponsorship. Opting for governmental funding may avoid some of the market pressure business sponsorship entails (namely, business-friendly outcomes due to economic dependence), but it puts further strain on public spending. In addition, it may pose an obstacle to the development of private initiatives connected to ADR (e.g., clearing houses, accreditation mechanisms, trustmark programs, etc), just as governments and other public entities may have interests at play (namely, shareholding in a CSP, public policy issues or political agendas).

Hence, public funding may not only be the source of similar concerns to those expressed about business sponsorship, but further implies significant public economic burdening. Thus, business funding offers better solutions, so long as prescriptive safeguards are in place to address transparency, impartiality and independence concerns ensuing from market pressure. Those safeguards should aim at ensuring good practice and may depend on the specifications of the funding method:

- through access to ADR (e.g., UK and Germany). It raises concerns on:

¹⁵⁹ Not that the Body is bound to observe and implement any measures pursuant to the concerns expressed by the NRA, since it is not its role to oversight public policies but the interests of the parties in light of their will and the applicable norms, nor will this result in a change of the substantive decision in question. Yet it may provide future guidance and analysis in new cases. This advisory function may be facilitated when the Body includes a consultation office or organ, as mentioned in Section 5.4.

- affordability (too high a fee-value may deter or be an impediment for the parties to adhere or participate, or may prove disproportional in light of the redress sought), and
- abuse (too low a fee may entice procedural abuse and vexatious or frivolous complaints).

More specifically, a pre-stipulated fee as used in the UK fails to take into account specific procedural spending (which may diverge greatly according to which phase the proceedings are taking into) and case-value. Additionally, the system burdens CSP only. Though as referred above CSP may be expected to improve their IDR procedures to avoid the ADR referral cost, there is no control mechanism ensuring consumers do not abuse their means of redress either¹⁶⁰. In turn, the German system applies a fee that is gradated according to the complaint's value and divides it equally between the parties. This may represent an impediment to economically disadvantaged end-users, while, at the same time, an equal division of the fee does not necessarily amount to an equitable solution.

- through industry-based criteria. For example, that all or some CSP must contribute and in which proportion (equally or gradated according to their earnings).

The most noticeable disadvantage here is the loss of a link between the funding and the registered complaints, i.e., the loss of accountability, which may be further aggravated by the exclusion of certain CSP (see Canadian example, next). In fact, smaller CSP may lack the incentive to establish or improve customer service and IDR due to not sharing in on the ADR costs. Similarly, it may overburden major CSP, without it reflecting either the quality of (or investment in) their IDR or the (dis)satisfaction concerning their services. More so, though compulsory membership might curb some of the market pressure¹⁶¹, it does not eliminate the risk of industry-favouring decisions, potentially undermining the ADR system's integrity and credibility. This can only be achieved, as

¹⁶⁰ There is some control of the complaints' seriousness by the schemes' ability to refuse vexatious or frivolous complaints, but there is no clear guidance as to what may be refused and under what grounds.

¹⁶¹ See e-Bay case reported in Bygrave (2002), p.9.

mentioned, through specific provisions cautioning those fears, observation of due process and increasing transparency.

- through mixed criteria. This may include a conjugation of the above mentioned criteria or even others, making a critical analysis possible only on a system-basis.

On creating the Commissioner for Complaints for Telecommunications Services¹⁶², the Canadian NRA¹⁶³ opted for industry-based “financial contribution”, imposing a mandatory membership of 3 years¹⁶⁴ for all CSP whose annual revenues exceeded \$10 million. The funding is determined according to a proportion-rate¹⁶⁵ and encompasses both an annual fee and a complaint-based fee (complaints registered per CSP).

For this paper’s purposes, a mixed criteria method, which simultaneously awards efficiency and dispute prevention, is preferred:

- compulsory participation of all CSP in the funding, so as to avoid free-riders and lack of incentive for IDR improvement. Because membership is also mandatory, it further avoids market pressure connected to forum shopping;
- an annual fee, as applied in Canada, may be conceivable especially in the early stages of implementation of the Body, but should be progressively abandoned in favour of complaint-related fee(s), as to reinforce accountability and also proactive measures by CSP;
- any applicable fee should be independent of the dispute’s outcome and cost-oriented
 - the Body should aim at keeping costs low, by providing efficient resolution – namely, improving procedural costs by optimising its ICT tools (using open source software, customising the WCLF and the ECMS), by employing automatic resolution where possible, by observing due process and providing

¹⁶² The independent consumer agency in charge with resolving consumer complaints. See Order in Council P.C. 2007-533, 4 April 2007, Telecom Public Notice CRTC 2007-16, of 22 August, and Telecom Decision CRTC 2007-130, 20 December 2007. <http://www.crtc.gc.ca/eng/archive/2007/dt2007-130.htm>. Also: <http://www.crtc.gc.ca/eng/archive/2007/pt2007-16.htm>

¹⁶³ The Canadian Radio-television and Telecommunications Commission.

¹⁶⁴ Revisable after that period.

¹⁶⁵ “The Commission (...) considers that (...) the TSP with the direct consumer relationship should be accountable to the complainant”. <http://www.crtc.gc.ca/eng/archive/2007/dt2007-130.htm>, paragraphs 30-35. <http://www.ccts-cprst.ca/en/about/structure-and-funding>

well-substantiated decisions (as to deter reviews and appeals), by filtrating and excluding vexatious and frivolous complaints (disregarding them equally on determining the complaints' numbers used to establish fees), and by making adequate use of available mechanisms to deal with procedural abuse (e.g., bad faith penalties);

- the applicable fee should concern the number of complaints registered per CSP and, though it should disregard the outcome, it should reward case resolution at an earlier stage of the proceedings, by way of a reduced fee;
- administration fees or cost sharing should be applied to end-users in cases where procedural bad faith is ruled against them¹⁶⁶.

5.5 Beyond the opening performance: an anticipation of the system's evolution

The proposed model might be susceptible of criticism for not entailing a solution that is friendlier towards privatisation of ADR. Yet such considerations disregard both the system's purposes and aim. Access to justice is a corner stone of a democratic state of law and a constant policy-making concern. Within the EU, it finds provision in numerous community and national legislation¹⁶⁷ and is this proposal's foremost purpose and aim. Just as discussed above about industry initiatives with respect to consumer needs¹⁶⁸, there are also situations that private ADR might not feel sufficient incentive or market pressure to address (namely, where profit is unlikely or too low to justify the investment).

Thus effective access to justice is sought through the implementation of a system carried out by an independent entity and which is strongly anchored and shaped by public incumbencies, powers and rules but is flexible enough and responsive to the evolution of

¹⁶⁶ The reason why otherwise a fee payable by end-users is excluded relates to emphasising the special position CSP find themselves in to address and resolve the complaints, while consumers often lack bargaining power to make themselves heard. Additionally, a consumer who feels satisfied with the way his complaint was handled and feels his concerns were addressed, is less likely to resort to ADR, even if the outcome was unfavourable to him. Ofcom (2010), 5.12-5.21.

¹⁶⁷ Including EU Treaty, Article 65(2)(e) (with subparagraph (g) provisioning the adoption of measures for the development of "alternative methods of dispute settlement"); the Charter of Fundamental Rights of the European Union, Article 47, and the European Convention on Human Rights, Article 6.

¹⁶⁸ See Section 2.1-2.1.3.

the market. Furthermore, by accounting consumers as active participants in the process, this ADR proposal empowers them, enhancing consumer confidence in the system and in the market.

Nonetheless, the proposal is intended as an initial roll-out and does not stand as an impediment to the development of solutions by the private sector, whether by the communications industry or through the surge of an ADR “industry”. In fact, it welcomes it, as it has the potential to complement its proactive goals. From examples occurring in e-commerce ODR¹⁶⁹, it may be guessed that private initiatives in the ECS context will also embrace accreditation mechanisms and affiliation programs, i.e., trustmarks, alongside ADR provision increasingly moulded by ICT development. In tune with previous considerations, then, they should aim at intervene to prevent complaints from escalating into litigation, acting as an “extension” of CSP’s IDR and being resorted to in a moment previous to the registering of the complaint with the Body.

A recent academic dissertation pointed to the need to resort to government regulation to achieve neutrality and thus create functional equivalence between traditional ADR and electronic ADR¹⁷⁰ (henceforth, e-ADR), through implementation of a core set of principles that, once complied with, will create similar procedural and substantive guarantees to those found in offline dispute settlement environments¹⁷¹. Another academic work pointed to the need to “[design] a regulatory model [to] set legal standards for mandatory ODR, (...) create a pan-European trustmark (...) granted to [complying] ODR providers [and implement compliance monitoring by co-operation] between national and regional authorities through the European Consumer Centres Network (ECC-Net)”¹⁷².

Though some further regulation is indeed desirable, it should be tailored to address the specific characteristics of the implemented ADR, i.e., be prescriptive (as opposed to

¹⁶⁹ Kaufmann-Kohler and Schultz (2004); Menkel-Meadow (2003).

¹⁷⁰ Whether private or public ADR.

¹⁷¹ Schiavetta (2008).

¹⁷² Cortés, “Developing...” (2010), p. 1. While in his dissertation (Cortés, “Online...”, 2010) the author proposed this statutory intervention via a Directive, in this article the preference falls on a Regulation act.

providing mere guidelines) and establish normative minimums that eliminate or lessen inherent shortcomings or vulnerabilities of the system. Simultaneously, it should not hinder the system's benefits and potential development. Where there is a need to improve procedural or substantive guarantees in ADR that transcends traditional ADR, regulatory change should not aim at establishing functional equivalence *per se*, but at ensuring that those differences do not result in a distortion of the system's objectives (access to justice and dispute settlement) or of general principles of law (namely, connected to security requirements¹⁷³, rule of law, due process and impartiality, enforcement and cross-border issues¹⁷⁴).

The fact that there seems to be broad consensus regarding the desirable core principles and standards applicable to ADR¹⁷⁵, including e-ADR, is a testament of the acquaintance by international, national and supranational bodies and governments with the key issues surrounding ADR and of accord as to the direction to take when implementing them. It attests to the possibility of harmonisation.

Thus, the implementation in every EU Member-State of a model identical to the one described or, when other systems are already in place, the harmonisation of their powers and scope of action with those of the depicted model, would permit establishing similar work practices, achieve similar access to justice and therefore homogenous consumer protection, and enhance the sharing of information and experiences between the Bodies. The creation of a common database for decisions, including explanatory memorandums, and statistics would likewise potentiate the outlining of best practices and benchmarking. As all Bodies would be subject to identical confidentiality requirements regarding the parties and specific rewards attributed, it is unlikely that confidentiality breaches would occur. On the other hand, the awareness that its decisions would be open to scrutiny by its peers is likely to further commit an individual Body to especially substantiate and explain each decision.

¹⁷³ See note 83.

¹⁷⁴ E.g., conflict of laws, decision recognition and enforcement.

¹⁷⁵ Bygrave (2002), p8.

Though the database does not pretend to emulate the creation of precedent amongst the national Bodies, it can nevertheless contribute to clarifying doubts, homogenising experiences and increasing the level of predictability of decisions. It highlights the need for collaboration and a concatenation of efforts by the Bodies to serve identical justice within the EU internal market, as another Body's decision is not binding for the remainder.

Should there be a want to submit the Bodies to a monitoring system, it should not trespass the limitations already applicable on a national level. If there is evidence of inappropriate use of power by a Body, Member-States have traditional legal tools available to address it. Hence, it might be preferable to conceive a consulting and collaborative system overarching the Bodies. This role could be played either by national and regional authorities through the ECC-Net or by the Body of European Regulators for Electronic Communications (BEREC)¹⁷⁶ and would mostly relate to improving the Bodies' performances by giving guidance and clarification on new legislation, advising on market and consumer concerns and facilitating harmonisation of procedures and dispute settlement.

The increased advantage to establishing this direct connection and collaboration between the different national Bodies and then also BEREC, for example, is that it may attenuate the obstacles and ease the enforcement of decisions in other national territories. By being able to immediately and directly access a decision, other Bodies may be able to use their own enforcement mechanisms to speed-up compliance with it.

The specifics of this strengthened collaboration should be the object of regulation or at least of a code of conduct between the national Bodies. Such rules need to address, amongst other aspects, the procedures to comply with amongst the Bodies to request enforcement in another Member-State's territory, any limits to that enforcement, and how to proceed if a Body refuses to enforce a decision by another peer due to disagreement

¹⁷⁶ Established by Regulation (EC) No 1211/2009, BEREC aims at providing a framework for cooperation between NRAs and could therefore use its expertise to further promote homogenisation and collaboration between the Bodies as well.

(whether resulting from the lack of formal elements, such as substantiation of the decision, or a disagreement regarding the content or direction of the decision)¹⁷⁷.

Finally, and despite the fact that specific issues concerning cross-border disputes transcend the more general scope of this paper, it is proposed here, at least regarding the majority of the disputes, that the Bodies may stipulate as a preemptive choice of law the law of the jurisdiction corresponding to where the service is normally provided. The reason for this is that, in the EU at least, CSP are required to get a license in order to provide services within a Member-State's territory. Hence there will likely be a connection of both the end-user and the CSP to the territory where the service is provided and thus to the corresponding jurisdiction. It will also, for most cases, mean that the national Body is the most indicated to solve the dispute. This preemptive criterion eliminates forum shopping and will generally find a connection with the parties' expectations. Where the parties do not desire that jurisdiction to apply, they may for example resort to private ADR or, if both agree, present the complaint to a different national Body (as long as competent in accordance to the applicable private international law rules). It is also advisable, therefore, that besides the two contractual parties, the consumer on whose behalf a services provision contract might have been made should also be given legitimacy to present a complaint.

¹⁷⁷ The same could be said of collaboration with other ADR systems, such as the pan-European online small claims procedure, by way of recognising a national Body's decisions and seeking to enforce them (when a monetary remedy has been awarded to the claimant).

6 Completing the partiture: proactive dispute prevention

The previous sections outlined a B2C complaint-handling scheme based on an increased use of new technologies, conciliated with employed models and focusing on surfacing trends and best-practice examples. It aims at qualitative¹⁷⁸ as much as quantitative improvement. Similarly it hopes to boost B2C ADR within the ECS sector to generalised practice, while being forward-looking to not constrain either future development, a harmonisation of B2C ADR procedures within the EU or even extension to disputes where end-users are the respondent. It has the potential to facilitate the exchange of data and of best-practice models between equivalent bodies within other EU Member-States, as well as increase accessibility to the data by NRAs or other organisations in outlying areas.

On analysing the reasons behind the rising levels of consumer complaints, accompanied by a decrease of information queries, the following conclusions were drawn:

- a) Consumers are aware of their role within a competition-based market, demanding ever greater quality of service (including customer service);
- b) Though more empowered, consumers still often feel the frustration of not having their position acknowledged or of lengthy and stressful dealings with their CSP to achieve a solution in a conflict situation. This is aggravated by the sense of absence of speedy and comprehensive dispute-settlement mechanisms to pursue their resolution or pressure CSP to address those complaints;
- c) The growing availability of information requires ICT systems to guide users throughout complaint-lodging, and

¹⁷⁸ Paraphrasing Bing and Harvold (1977), p.225: “[N]ew technology represents a basic change influencing (...) habits. Comparing the [actions and results available] before and after the introduction of the new technology, one will find a difference in *quality*. A different type of [processing and/or use of data] is conducted”.

- d) The availability, accessibility and user-friendliness of ICT systems encourage their use.

The suggested model answers consumers' concerns by offering accessibility and guidance on lodging a complaint. Furthermore it provides an immediate automated reply that connects users to relevant information about their contracts and the procedures ahead. By acquainting end-users with their rights and adequate redress-mechanisms, it effectively empowers them and decreases inefficiencies and resources' misuse.

Finally the ICT design is thought out to add functionality. It not only contributes to optimising the cases' life cycle, but it makes the system itself a tool of both the handling and the resolution of simple disputes, where a determination of the compensation or award can be carried out automatically. It lends efficacy to the contract's enforcement.

Simultaneously IDR development by CSP is encouraged, by remaining a pre-requisite of access to the ADR mechanism. If no IDR is in place, operators dispense the opportunity to solve the complaint without external interference (and additional costs). These measures aim at proactively prevent disputes.

The system is then conducive to the effective resolution of the disputes, i.e., the decisions are binding and enforceable. Because the ADR is conducted by a Body other than the NRA, it allows the regulatory authority to maintain itself aside the proceedings, warding its impartiality and reputation.

However, the system does not dispense NRAs from a more active participation. They can lend it effectiveness by overseeing compliance by CSP through their own channels and can be called to monitor the quality of the services provided by the ADR Body. This monitoring may be done through the procedural review in place and through statistic analysis of the number of reviews received, of cases where formal procedures were not respected, and even of complaints lodged against the Body. NRAs can potentially even function as an accreditation entity regarding the Body, in a similar way to that being done in the UK.

As a corollary, the paper focused on the relevance of contract certainty, as a contributing factor to compliance and risk management frameworks. Less legalistic and more consumer-friendly contract-forms may prove valuable assets for all stakeholders.

Nevertheless, policy certainty and transparency is first and foremost an overarching vertical issue. The legal framework of the EU communications market must provide clear directions, not just for consumer protection, but as a tool for good governance and effective implementation and compliance. This is essential for conflict prevention. Likely with this in mind, recent changes¹⁷⁹ have equiparated the minimum protection for end-users applicable to internet and television services¹⁸⁰ to that already existent for phone services. It attests to the realisation that the notion of universal service does not contend with a common minimum core of rights. Yet some discrepancies remain (e.g., only the suspension of phone services for non-payment of bills is required to be preceded by a notice of suspension¹⁸¹), which should also be addressed.

Similarly, the classification of Voice over IP (VoIP), a voice service provided over the internet, as an internet service instead of a phone service (due to its analogous functions), excludes it from the regime of universal service. This has consequences not always evident to consumers and is difficult to concatenate with notions of technological neutrality and substitutability of services, both competition enhancers¹⁸².

¹⁷⁹ See amendments introduced to the Universal Service Directive by Directive 2009/136/EC (Cookies Directive).

¹⁸⁰ Until this amendment, the unilateral modification of television and internet contracts by a CSP was excluded of regulation apart from national contract law, and therefore deprived of a statutory sanction.

¹⁸¹ Universal Service Directive, Recital 16 and Article 10(2), in conjunction with Annex I, Part A, e). In Portugal, this obligation was stipulated regarding other electronic services as well, by Law 5/2004, Article 39(2)(a), but it failed to be introduced to EU legislation (see previous note).

¹⁸² The argument that VoIP cannot be a phone service due to the difficulty of tracking the VoIP number's location on an emergency call situation is only partially valid. This requirement [Universal Directive, Article 26(3)] is no impediment when the VoIP service is associated by contract with a unique geographical address. These VoIP numbers are included on the national numbering plan; they are susceptible of inclusion on phone directories and can access enquiry services. Hence the obstacle only arises when the service is provided via wireless technology. Yet as technology evolves, it will undoubtedly become easier to suppress that difficulty. Furthermore, the amendments introduced by the Cookies Directive to the Universal Service Directive, Article 20(1)(b), first paragraph, and Article 26(2) (where the expression "electronic communications service" is used) seem to point towards this change. Either way, at least with regard to VoIP service which satisfies legal

6.1 Challenges present and future

Further development of B2C ADR will continue to raise questions on:

- equity and consumer voicing, especially within developing countries;
- effective enforcement, both on national and cross-border disputes (with ODR showing here great promises of flexibility, dematerialisation and speed¹⁸³), and
- resources optimisation, including decreasing IT carbon footprint.

New products and services will keep changing behaviours and consumer expectations and new hybrids of ADR will likely be set in practice.

Until present, investment on ADR development has focused mainly on B2B disputes¹⁸⁴, with the support of international bodies, such as the World Bank and OECD¹⁸⁵, and even countries like the USA, encouraging the surging of a business of dispute providers¹⁸⁶. This has lead to the emergence of:

- clearing houses – intermediary bodies between the potential claimants and the dispute providers, assisting the parties in choosing the most appropriate provider for their dispute and in initialising the process; this referral has been labelled as a “control of quality” mechanism of available providers, but has also raised questions of potential favouring of some providers¹⁸⁷;

requirements applicable to phone service, there is no substantiated reason to not encompass it under a more extensive protection, as that available for universal service.

¹⁸³ Kaufmann-Kohler and Schultz (2004).

¹⁸⁴ Of which ADR associated to International Investment Agreements has gained increasing prominence - <http://investmentadr.wlu.edu/resources/page.asp?pageid=592>

¹⁸⁵ http://rru.worldbank.org/Documents/Toolkits/adr/adr_fulltoolkit.pdf . Other examples of initiatives and further reading: http://www.oecd.org/searchResult/0,3400,en_2825_293564_1_1_1_1_1,00.html

¹⁸⁶ E.g., <http://www.abanet.org/dispute/home.html>

¹⁸⁷ Kaufmann-Kohler and Schultz (2004).

- of an increasingly specialised offer of ADR services, associated with a privatisation of dispute resolution, and the inherent risk of “pick and choose” and “forum shopping”, when more than one ADR system or set of rules is susceptible of application¹⁸⁸,
- accreditation and appellate mechanisms to exert control over private ADR bodies, etc.

Much could be said about each of these points and the contribution they could make to the development of the proposed model into a still more complex system. Due to scope constraints however, this paper will only brush one last paradigm requiring shifting. “The time has come for a different theory of the institutional location and function of complaint agencies. One suggestion is to regard them as located within a new fourth branch of government – an oversight, review and integrity branch. (...) [Another view places them] as a part of the justice system. (...) The challenge for complaint handling bodies is to demonstrate that they are the frontline of the justice system.”¹⁸⁹ Though the comment specifically concerns public administration complaint-handling agencies, its rationale applies more widely.

Indeed, allocating clear and defined responsibilities to ADR bodies sediments their legitimacy, both legally and *de facto* (for ex., by imposing the publicity of performance-accounts), and encourages a more efficient use of their competences. This means they are given the ability to effectively perform their roles of dispute prevention and resolution, while decreasing Court litigation and jurisdictional overlapping.

It engages a holistic approach to justice: ADR bodies are no longer subsidiary or an alternative, but complementary to the judicial system. They permit filtrating disputes according to subject relevance and potentially initiate a more proficient dialogue with the consumer, set on integrity, accountability and good governance standards. Whichever the answer to the previous excerpt, and this paper inclines towards the second view, they don’t have to be mutually exclusive. As pointed, NRAs themselves can have a much more active role in ADR dynamics, even if just by contributing to a more effective enforcement of

¹⁸⁸ Ibidem; Menkel-Meadow (2003).

¹⁸⁹ MacMillan (2009), p.5.

decisions or of sanctions on delaying practices carried out by the parties within ADR proceedings¹⁹⁰.

¹⁹⁰ ITU (2004), p.65

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Annex 1

Abbreviations

General:

ADR	Alternative Dispute Resolution
BEREC	Body of European Regulators for Electronic Communications
CSP	Communications Services Providers
E-ADR	Electronic Alternative Dispute Resolution
ECS.....	Electronic Communications Services
EU	European Union
ICANN.....	Internet Corporation for Assigned Names and Numbers
ICT	Information and Communications Technology
IDR	Internal Dispute Resolution
ITU.....	International Telecommunication Union
NRA	National Regulatory Authority
ODR	Online Dispute Resolution
SchliO2008.....	Schlichtungsordnung gemäß § 47a Abs. 4 des Telekommunikationsgesetzes
TKG.....	Telekommunikationsgesetz (2004)
UDRP.....	Uniform Dispute-Resolution Policy

National Regulatory Authorities for Communications:

ICP-ANACOM ..	ICP-ANACOM (Autoridade Nacional das Comunicações) (Portugal)
Ofcom	Office of Communications (UK)
RegTP	Regulierungsbehörde für Telekommunikation und Post (of the Bundesnetzagentur/Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway) (Germany)

Annex 2

Electronic communications most common complaints by content received by ICP-ANACOM – Autoridade Nacional das Comunicações¹⁹¹ ~ comparative table for 2006, 2007, 2008, 2009 and 2010 ~

Solicitation by content

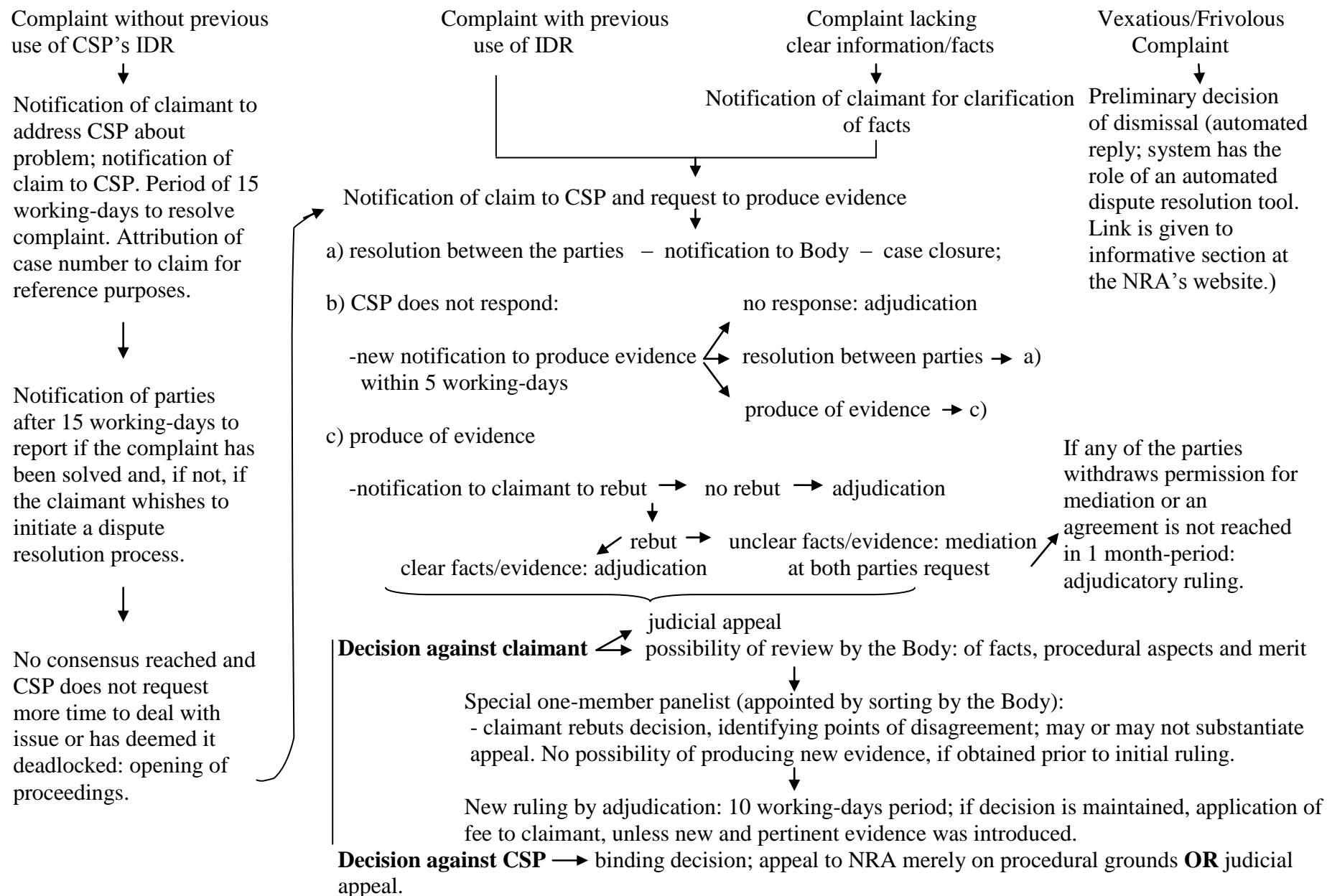
Subtitles:

n.a. - not available

		Total				
	Content	2006	2007	2008	2009	2010
1.º	Equipment	2,296	3,685	5,549	7,425	7,351
2.º	Tecnical support/assistance	1,649	3,419	5,884	6,255	3,137
3.º	Client Service	2,489	3,288	5,002	6,316	5,850
4.º	Billing	2,188	2,954	4,989	7,495	7,234
5.º	Carrier Selection and pre-selection (call-by-call selection)	59	2,803	533	109	80
6.º	Initial Supplying / Cancelling of service	1,777	2,772	5,825	7,120	7,368
7.º	Mal-functioning / Interruption of Service	1,446	1,826	2,865	4,441	4,646
8.º	Contract	1,745	1,714	4,048	5,390	4,960
9.º	Tariffs	627	1,054	1,550	2,225	2,893
10.º	Suspension of Service	823	909	1,539	2,130	2,075
11.º	Internet Speed	331	582	762	1,001	931
12.º	Portability	292	475	1,395	1,486	1,154
13.º	Unbundling of the local loop / Local loop	633	242	137	57	26
14.º	Complaint Book	86	167	226	194	259
15.º	Infrastructures	97	149	239	249	250
16.º	Geografic "Portability"	n.a.	91	152	141	10
17.º	Numbering	12	91	37	41	28
18.º	Roaming	39	91	179	176	169
19.º	Privacy and Protection of Personal Data	59	82	164	196	243
20.º	Phonebook and Information Services	70	55	37	30	40
21.º	Municipal Fee for Rights of Way/TMDP - Municipalities set percentages	3	17	9	8	16
22.º	Information and Statistics Requests	n.a.	2	n.a.	n.a.	n.a.
Total		16,721	26,468	41,121	52,485	48,720

*Change of address for the providing of land phone services while keeping the same phone number.

¹⁹¹ The table includes only written complaints' contents (note that one complaint might report one or more issues falling into one or more content categories; hence total values will not coincide with the numbers of received complaints). Data source: <http://www.anacom.pt/render.jsp?categoryId=315335> – the data regarding each year was collected from the correspondent annual report: table 6 (2006); table d, in Point 1.1.1. (2007); table d, in Point 1.1.1. (2008); table 2.1.3 (p.18) (2009); table 2.1.2. (p.17) (2010).



ANNEX 3